86-531

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.
Appellant

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP, an Illinois Corp.
AGENCY HOLDING CORP, an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK GRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG INC., a Pennsylvania Corporation
ROBERT OGLEVEE, individual

On Appeal from the United States
District Court for the Western
District of Pennsylvania
(D.C. Civ. No. 81-439)

Argued: November 19, 1985

Before: HIGGINBOTHAM, SLOVITER and MANSMANN, *Circuit Judges.*

(Filed May 30, 1986)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final summary judgement of the district court dismissing the complaint of appellant Malley-Duff & Associates, Inc. ("Malley-Duff"). For the reasons that follow, we will reverse and remand for further proceedings.

I.

Until February 13, 1978, Malley-Duff was an agent of defendant Crown Life Insurance Company ("Crown Life") for a territory surrounding and including Pittsburgh, Pennsylvania. Crown Life required Malley-Duff to represent it exclusively. Malley-Duff alleges that defendants formed an "enterprise," the purpose of which was "to acquire, take over or eliminate various Crown agencies that had lucrative territories in the United States of America," and

which did so by "false and fraudulent means and pretenses." The enterprise allegedly acquired Malley-Duff's agency by first inposing, nine months into the fiscal year 1977, a "bogus" production quota that could not be met, and then terminating the agency when it in fact failed to meet the quota. According to the complaint, the enterprise used similar means to acquire Crown Life agencies in Chicago, Peoria, Cleveland, Newark, Hartford, Denver, and elsewhere. It is further alleged that terminated agents were defrauded out of renewal commissions.

In April of 1978, Malley-Duff filed suit (*"Malley-Duff I"*) against defendants Crown Life, Lloyd, Craig, Agency Holding Company (Illinois), and Agency Holding Company (Ohio), as well as another individual not named in this suit, alleging violations of the federal antitrust laws and conspiracy to tortiously interfere with contract. The case was tried to a jury, but defendants won a directed verdict on the antitrust claims at the close of Malley-Duff's case. Malley-Duff won a verdict of $900,000 on the state conspiracy claim, but the jury concluded in answer to a special interrogatory that there was no tortious interference. On appeal, this court ordered a new trial, holding that there was sufficient evidence of a violation of § 1 of the Sherman Act to present a jury issue, and "that the verdict from answers on the remaining state law claims were inconsistent." *Malley-Duff & Associates v. Crown Life Insurance Company,* 734 F.2d 133, 136 (3d Cir.), *cert. denied,* 105 S. Ct. 564 (1984).

On March 20, 1981—prior to trial of *Malley-Duff I*—Malley-Duff filed the instant complaint, alleging causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982),[1]

[1]18 U.S.C.§ 1964(c) creates a private cause of action:

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for conspiracy to interfere with civil rights, 42 U.S.C. § 1985,[2] and a pendent state civil conspiracy theory. The RICO claims can be divided into two categories: (1) claims arising out of the allegedly fraudulent termination of the

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> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962 outlaws (a) the use of income derived from "a pattern of racketeering activity" or through the collection of an "unlawful debt" (defined at 18 U.S.C. § 1961(6)) to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce, (b) the acquisition or maintenance of any interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt, (c) conducting or participating in the conduct of an enterprise through a pattern of racketeering activity or collection of unlawful debt, and (d) conspiring to violate any of these provisions. Malley-Duff's complaint contained counts based on each of the four subsections.

"Racketeering activity" is defined in 18 U.S.C. § 1961(1) as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, any "offense" involving bankruptcy or securities fraud, and drug-related activity that is "punishable" under federal law.

A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of whcih occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5).

[2]This section provides in relevant part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or withness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

agency;[3] and (2) claims arising out of alleged obstructions of justice by defendants in the course of the discovery phase of *Malley-Duff I*.[4] The § 1985 claims were based on the same allegedly obstructive conduct. The civil conspiracy count incorporated allegations involving both the termination and the obstructions of justice.

This case was consolidated with *Malley-Duff I* on November 2, 1981, but was severed on January 11, 1983, prior to trial. Defendants had filed a motion for summary judgement on July 29, 1982. On March 23, 1984, the district court granted defendants motion and entered judgement for them on all counts. This appeal followed.[5]

II.

The district court dismissed Malley-Duff's RICO claims, to the extent they arose out of the allegedly fraudulent termination of its agency, on the ground that they were barred by the applicable statute of limitations. Because federal law does not provide a statute of limitations for civil RICO actions, the district court followed the settled practice of turning to the law of the forum state (in this case Pennsylvania) to "borrow" the limitations period for the state cause of action most closely analogous to

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[3]The complaint relies on multiple violations of the federal mail and wire fraud statutes. 18 U.S.C. §§ 1341, 1343, to establish the necessary element of a "pattern of racketeering activity."

[4]These allegations invoke 18 U.S.C. § 1503 (obstruction of justice), another RICO "predicate act." Specifically, the complaint alleges subornation of perjury, destruction of documents, interference with a United States Marshal, perjury, witness intimidation, and an attempt to blackmail the district judge originally assigned to *Malley-Duff I*.

[5]This appeal was initially listed for disposition on December 7, 1984, but was removed from the list for the purpose of supplemental briefing on issues raised by Sedima, S.P.R.L. v. Imrex Co., ____ U.S. ____, 105 S. Ct. 3275 (1985) and Wilson v. Garcia, ____ U.S. ____, 105 S. Ct. 1938 (1985).

Malley-Duff's claims.[6] *See Board of Regents v. Tomanio,* 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency,* 421 U.S. 454, 462-63 (1975); *see generally* Note, *Limitation Borrowing in Federal Courts,* 77 Mich. L. Rev. 1127 (1979). The parties agreed that common law fraud was the state cause most analogous to these claims, but disagreed as to whether a two-or six-year limitations period governed such actions in Pennsylvania.[7] The district court held that the two-year statute applied, and that

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[6]As the late Judge Henry Friendly once wrote:

> It has also been long established that when Congress created a federal right but did not prescribe a period for its enforcement, federal courts will borrow the period of limitation prescribed by the state where the court sits. . . . The basis of this was that Congress could not have intended an unlimited period for enforcement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation statutes of the states where they sit.

Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961).

[7]There is no dispute that, prior to 1978, fraud actions were governed by a six-year statute, and that 1982 amendments to the Pennsylvania Judicial Code make it clear that such actions are now subject to a two-year limitation. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1985). The question of which period applied during the intervening period, when this action was filed, has been the subject of considerable litigation. *See, e.g.,* Vosbikian v. Wasserstrom, No. 84-4674 (E.D. Pa. 1985) (available on LEXIS, Genfed library, Dist file) (six years); Bernicker v. Pratt, 595 F. Supp. 1034 (E.D. Pa. 1984) (six years); Ferber v. Morgan Stanley Co., CCH Fed. Sec. L. Rep. ¶99,634 (E.D. Pa. 1984) (two years); Fickinger v. C-1 Planning, Inc., 556 F. Supp. 434 (E.D. Pa. 1982) (two years); Culbreath v. Simone, 511 F. Supp. 906 (E.D. Pa. 1981) (six years), *See also* Fiebach & Doret. *A Quarter Century Later - The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania,* 25 Vill. L. Rev. 851, 855-56 n.26 (1980) (six years). Because we decline to use the fraud analogy, *infra,* we need not reach this issue.

claims filed on March 20, 1981, relating to events that occurred in early 1978,[8] were therefore time-barred.

Subsequent to the district court's decision, the Supreme Court of the United States decided *Wilson v. Garcia*, ____ U.S. ____, 105 S. Ct. 1938 (1985), which established a three-part inquiry[9] to guide the selection of the statute of limitations that will govern a federal claim. First, we must determine whether it is state or federal law that controls the characterization of the claim. Second, we must decide whether all claims arising under a particular federal law "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." Finally, "we must characterize the essence of the claim in the pending case, and decide which state statute provides that most appropriate limiting principle." 105 S. Ct. at 1943. In the subsections that follow we engage in the prescribed inquiry.[10] Our function here is to legislate interstitially, and in doing so we are

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[8]A large part of the briefing and argument in this matter has been devoted to the difficult issue of when the RICO claims accrued. This relates to Malley-Duff's contention that even if a two-year limit applies, its claims are timely. Because we adopt a six-year period, *infra*, and it is clear that all conduct complained of occurred within that period, we do not reach the accrual issue.

[9]The Court cited no precedent for the three-part inquiry, and its origins are unclear. 105 S. Ct. at 1943. There is nothing in the opinion, however, that would suggest that the approach is unique to § 1983 cases. Indeed, it appears to us that the Court intended to mark out a general approach to all statute of limitations borrowing problems.

[10]This court has held in two cases that *Wilson v. Garcia* should be applied retroactively in § 1983 cases. *See* Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir.), *cert. denied*, 105 S. Ct. 349 (1985); Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985). In Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), we applied *Wilson v. Garcia* retroatively to a claim brought under 42 U.S.C. § 1981. These results followed from the uncertainty that existed with regard to the applicable limitations period

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mindful of Justice Holmes, admonition that we are "confined from molar to molecular motions." *Southern Pacific Co. v. Jenson,* 244 U.S 205, 221 (1917) (dissent). We conclude that within each state all civil RICO claims should be characterized uniformly, in accordance with federal law, and that in Pennsylvania the most appropriate limitations period for all civil RICO claims is the six-year residual statute of limitations.

A. Controlling Law

In *Wilson v. Garcia,* which arose in New Mexico, the question whether state or federal law controlled the characterization of § 1983 claims was critical because the Supreme Court of New Mexico had definitively decided, as a matter of state law, that § 1983 claims should be analogized for limitations purposes to state claims brought under the New Mexico Torts Claim Act. *DeVargas v. New Mexico,* 97 N.M. 563, 642 P.2d 166 (1982). The United States Supreme Court held that *DeVargas* was not binding on federal courts. The Court noted that the "characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress purpose in providing it. These, of course, are matters of federal law. Since federal law is available to decide the question, the language of [42 U.S.C.] § 1988 directs that the matter of characterization should be treated as a federal question." 105 S. Ct. at 1943. The court found further support in § 1988's[11] instruction that state law shall apply

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under Pennsylvania law prior to these cases, making it not inequitable to apply *Wilson* retroactively. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Given the even greater uncertainty that has existed with regard to the applicable limitations period in this case, *see also* footnote 7 *supra, Wilson v. Garcia* should, *a fortiori,* apply here.

[11]Section 1988 provides in relevant part:

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"so far as the same is not inconsistent with" federal law, observing that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." 105 S. Ct. at 1944. In addition, the Court stated, "[i]n borrowing statutes of limitations for other federal claims, this Court has generally recognized that the problem of characterization 'is ultimately a question of federal law." *Id.* (quoting *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966)) (footnote omitted).

We have found no decisions of the Pennsylvania Supreme Court, or any lower court, purporting to characterize RICO claims under Pennsylvania law for limitations purposes. Nonetheless, if state law were to control the chartacterization our function would be to predict how the Pennsylvania Supreme Court would act, rather than to apply the principles developed by the U.S. Supreme Court in *Wilson v. Garcia* and other "borrowing" decisions. Thus, we cannot overlook this issue. Fortunately, we believe the resolution is quite clear. Though we cannot

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The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guility.

rely, as the Court did, on § 1988, we note that its borrowing principles are not unique—the confluence of the Supremacy Clause and the Rules of Decision Act produce the same result in other cases: "If... federal law is both pertinent and valid, it applies because the supremacy clause of the Constitution so commands; if the federal law is impertinent or invalid, state law applies because Congress has so directed." Western & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 Mich. L. Rev. 311, 316 (1980). Moreover, the federal interests in uniformity and having "firmly defined, easily applied rules," emphasized in *Wilson v. Garcia,* 105 S. Ct. at 1944 (quoting *Chardon v. Fumero Soto,* 462 U.S. 650, 667 (1983)(Rehnquist, J., dissenting)) apply with as much force to RICO as to other federal causes, such as § 1983, § 301 of the Labor Management Reporting Act, *see Auto Workers, supra,* or the federal antitrust laws, *see* Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83-84 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961), *Wilson v. Garcia,* 105 S. Ct. at 1944 n.19. We conclude that federal law controls characterization of RICO claims for limitations purposes.

B. Uniform or Particularized Characterization?

In characterizing Malley-Duff's termination-related RICO claims as analogous to claims for common law fraud, the parties and the district court have followed the settled borrowing practice within this Circuit of parsing the particular factual allegations and legal theories supporting an individual federal claim, rather than looking to the federally-created cause of action for a broader analogy that could encompass all claims brought thereunder in a given state. In *Wilson v. Garcia* Garicia the Supreme Court adopted the latter approach in the context of § 1983 cases, and we believe that their reasoning suggests that the same approach should be followed with civil RICO.

In *Wilson v. Garcia* the Court noted that the practice of borrowing state statutes of limitations promotes the policy of repose, but that

> when the federal claim differs from the state cause of action in fundamental respects, the State's choise of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

105 S. Ct. at 1945 (quoting *Johnson v. Railway Express Agency,* 421 U.S. at 463-64). Section 1983, the Court stated, "can have no precise counterpart in state law . . . [A]ny analogies to those causes of action are bound to be imperfect." *Id.* (footnote omitted).

> In this light, practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983, Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations. . . .
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> . . . If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same State, and multiple periods of limitations would often apply to the same case.

> There is no reason to believe that Congress would have sanctioned this interpretation of its statute.

105 S. Ct. at 1945-46 (footnotes omitted).[12] The Court also expressed a concern that the somewhat arbitrary selection of one analogy over another can appear result-oriented, and thereby undermine the appearance of neutral justice. 105 S. Ct. at 1945 n.24. The Court concluded that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach" of selecting "in each State, the one most appropriate statute of limitations for all § 1983 claims." 105 S. Ct. at 1947.

Civil RICO is as far removed from any traditional state cause of action as is § 1983.[13] This is well-illustrated by *Durante Brothers and Sons v. Flushing National Bank*, 755 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 3530 (1985), where the Court of Appeals rejected the district court's choice of a state statute of limitations for actions to recover an overcharge of interest in a RICO case predicated on collection of an unlawful debt. The court pointed out that the seemingly apt analogy dissolved when the elements of the RICO claim were closely examined:

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[12]This court had followed the case-specific approach rejected by the Supreme Court in *Wilson v. Garcia*. *See* Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974)(in banc).

[13]We do not suggest that civil RICO is a uniquely federal remedy in the same sense as § 1983. A state could, as some have, create a private cause of action substantially similar to civil RICO. *See* Wright, *A Look at State RICO Statutes in RICO: Expanding Uses in Civil Litigation* (1984). Pennsylvania's RICO-type statute, 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1983), however, does not provide for a private cause of action. *See* D'lorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982). Though we do not have occasion to so decide, we note that where a state has created a private cause of action substantially similar to the federal civil RICO action, the state limitations period controlling such actions might be an appropriate choice for the federal courts to borrow, provided the period is not so short as to contravene federal policies.

> In the context of the allegations made here, therefore, success on these counts would require proof that, *inter alia,* (1) there was a RICO enterprise, (2) its activities affected interstate commerce, (3) the individual defendants were employed by or associated with the enterprise, (4) the Bank used, in the operation of the enterprise, income derived from the collection of unlawful debt, and (5) the individual defendants participated in the conduct of affairs of the enterprise through the collection of unlawful debt. 18 U.S.C. § 1962(a) and (c). In addition, to prove that what was collected was an unlawful debt within the meaning of RICO, Durante would have to show that (6) the debt was unenforceable in whole or in part because of state or federal laws relating to usury, (7) the debt was incurred in connection with "the business of lending money . . . at a [usurious] rate," and (8) the usurious rate was at least twice the enforeable rate. *Id.* § 1961(6). And Durante would have to show that (9) as a result of the above confluence of facts, (10) it was injured in its business or property. *Id.* § 1964(c).

755 F.2d at 248.

The court went on to state:

> The above listing of elements that must be proven in order to establish civil RICO liability for collection of an unlawful debt makes clear that the civil RICO action is not simply an action to recover excessive interest or to enforce a penalty for the overcharge. RICO is concerned with evils far more significant than the simple practice of usury. . . . In contrast, a state law claim . . . could be established without proof of nine of the ten listed elements of the civil RICO claim.

755 F.2d at 248-49. We believe a similar analysis would apply to any RICO claim. Concepts such as RICO 'enterprise" and "pattern of racketeering activity" were simply unknown to common law, and all federal crimes contain

jurisdictional and other elements irrelevant to any state civil action. Thus, as with § 1983, any analogies to traditional state causes of action "are bound to be imperfect." *Wilson v. Garcia,* 105 S. Ct. at 1945.

This case provides abundant evidence that a particularized approach to borrowing statutes of limitations "inevitably breeds uncertainty and time-consuming litigation." Even RICO claims based on "garden variety" business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods. A state may even have different limitations periods for common law fraud and securities fraud. *See also Eisenberg v. Gagnon,* 564 F. Supp. 1347, 1353-54 (E.D. Pa. 1983), *rev'd in part,* 766 F.2d 770 (3d Cir.), *cert. denied,* 106 S. Ct. 343 (1985). More extreme cases might include allegations sounding in assault, battery, false imprisonment, infliction of emotional distress, abuse of process, or trespass to land or chattels. The fact that RICO requires at least two predicate acts in all cases makes it even more likely that more than one analogy will have force in a given case.[14] "The current approach is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward

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[14]The statutory definition of 'racketeering activity,' 18 U.S.C. § 1961(1) contains a laundry list of federal and state offenses. Unless the two alleged predicate acts are closely related, . . . it is unlikely that both acts could be subject to the same statute of limitations. Under these circumstances, the federal court would be saddled with the unenviable task of selecting one of the two disparate limitations periods. Defendants would solve this dilemma by requiring the court to determine which predominates the complaint. Such a process could be arbitrary at best, and this Court is unwilling to engage in such capricious selections. Morley v. Cohen, 610 F. Supp. 798, 809 (D. Md. 1985).

matter." A.B.A Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 391-92 (1985) [hereinafter cited as "*Task Force Report*"].[15]

In *Wilson v. Garcia* the Court stated that "the legislative purpose to create an effective remedy for an enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." 105 S. Ct. at 1947 (footnote omitted). Like § 1983, civil RICO was intended to be a useful remedial device and a supplement to criminal law enforcement in an area peculiarly in need of federal intervention. *Sedima,* 105 S. Ct. at 3286. As today's cases demonstrate, its effectiveness can be substantially thwarted by uncertainty, with the concommitant dissipation of legal resources. We hold, then, that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims. *See also Electronic Relays v. Pacente,* 610 F. Supp. 648 (N.D. Ill. 1985); *Victoria Oil v. Lancaster Corp.,* 587 F. Supp. 429 (D. Colo. 1984). *But see Silverberg v. Thomson McKinnon Securities,* No. 85-3349 (6th Cir. April 10, 1986).

C. The Applicable Limitations Period

The final stage in our inquiry is the selection of the one Pennsylvania limitations period that will govern all civil RICO actions arising there. This process of characterization cannot take place in a vacuum—it would accomplish nothing to characterize civil RICO in a way that does

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[15]This report was issued March 28, 1985 by a five member task force. It is neither approved by the A.B.A. nor does it represent the A.B.A.'s official position. It was, however, cited extensively by both the majority and dissenters in *Sedima.*

not correspond to any existing Pennsylvania statute of limitations. Rather, we must, as the Supreme Court did in *Wilson v. Garcia,* choose the best out of the available candidates. We have been greatly aided in this process by the parties' thorough supplemental briefing.

In *Wilson v. Garcia,* the Supreme Court chose a state limitations period for "personal injury" actions to govern § 1983 cases in New Mexico.[16] Given that the Court had earlier conceded that characterization "will often be somewhat arbitrary," 105 S. Ct. at 1946 n.24, it should not be surprising that the Court did not present a very detailed rationalization for its choice. Nonetheless, there is some guidance to be extracted from their discussion.

The Court noted that "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort." 105 S. Ct. at 1948. Of the potential tort analogies, the Court stated that

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[16]The Court was careful to acknowledge that its approach would only achieve uniformity within each state. Though this can, in part, be a result of the fact that states will prescribe different periods of years for the same actions, the Court must also have been aware that a characterization useful in one state may find no counterpart in others. As Justice O'Connor pointed out in dissent, 105 S. Ct. at 1953, on the very day the Tenth Circuit decided *Wilson v. Garcia,* it also held that the personal injury characterization found no counterpart in Colorado's limitations scheme, and therefore adopted a different characterization and borrowed the catchall limitations period for actions on a statute. McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984)(in banc). In still another case decided the same day, the Tenth Circuit borrowed a four-year statute of limitations which applies to actions for relief "not otherwise provided for by law" for § 1983 actions arising in Utah, Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984)(in banc), *cert. denied.* 105 S. Ct. 2111 (1985). Thus, Judge Sloviter's concurrence in A.J. Cunningham Packing Corp. v. Congress Financial Corp., Nos. 85-3366 & 85-3380, is not correct in stating that the "absence of an available 'catch all' in all states" distinguishes this case from *Wilson v. Garcia.* Our choice of a characterization for civil RICO actions in Pennsylvania does not preclude choice of a different approach in other states within this Circuit. *See* footnote 13 *supra,* regarding State RICO statues.

"Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.* The Court's basis for this categorical statement was the language of the fourteenth amendment: "no *person* shall be deprived of life, liberty or property . . . " "A violation of that command is an injury to the individual rights of the person." *Id.* The only other point the Court mentioned as favoring the personal injury characterization was that:

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

105 S. Ct. at 1949.

We may also obtain some guidance from the Court's reasons for rejecting two other proposed analogies. First, the Court stated that the "relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states." 105 S. Ct. at 1948 (also noting that § 1983 enforces constitutional, not only statutory, rights). Second, the Court rejected an analogy to state remedies for wrongs committed by public officials as it was the very inadequacy of such remedies, "that led Congress to enact the Civil Rights Act in the first place." 105 S. Ct. at 1949 (footnote omitted).

With this background, we proceed to consider the merits of various limitations periods available under

Pennsylvania law.[17] The suggested candidates are the limitations periods for common law fraud,[18] for civil penalty or forfeiture, 42 Pa. Cons. Stat. Ann. § 5524 (a "potpourri" two-year statute of limitations), and the "catchall" six-year residual statute of limitations. Clearly, we should not expect an epiphany through which the "essence" of civil RICO is revealed to us. Rather, we can hope for no more than finding a workable rule that is consonant with the purposes of civil RICO, and defensible under reasonably neutral criteria of statutory construction.

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[17]It has also been suggested that this court borrow the Clayton Act's four-year limitation on private treble damage antitrust suits. In DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court held that federal courts should "turn away from state law" and borrow a limitation period from elsewhere in federal law "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making." 462 U.S. at 172.

A number of things can be said in favor of this characterization. RICO was drafted with the antitrust model of crinimal sanctions supplemented by private treble damage actions in mind. Both the Clayton Act and RICO require that private plaintiffs be persons who have been "injured in [their] business or property." 15 U.S.C. § 15(a);18 U.S.C. § 1964(c). Also, both RICO and the antitrust laws deal with a wide range of conduct affecting commerce. Finally, in favor of this characterization, it can be said that it promotes uniformity—not only within a state, but nationally as well.

The factors militating against this characterization are that (1) though RICO and the Clayton Act both require injury to business or property for standing to sue, there is little overlap between the types of *conduct* that are prohibited; and (2) despite the fact that Congress consciously drew upon the antitrust model in drafting RICO, it did not include a comparable statute of limitations period, perhaps indicating a congressional intent that there not be a national standard. We have been cited no relevant legislative history on this point.

On balance, we do not believe the Clayton Act analogy meets the high standard required by *DelCostello* to justify "turning away from state law." *See also Task Force Report* at 385-392.

[18]As noted previously, it is not clear what that period was at the time this case was filed. *See* footnote 7 *supra* and accompanying text.

Fraud

Malley-Duff has suggested that common law fraud would provide a suitable analogy for all civil RICO claims. As one court has stated, however, "it is obvious that the common law fraud analogy falls far short of capturing the multitude of factual bases on which RICO can be based." *Electronic Relays,* 610 F. Supp. at 651. We, too, are reluctant to elevate one predicate act among many to the status of a uniform RICO characterization. Even if it is true, as Malley-Duff argues, that fraud is the predicate act upon which most civil RICO actions are premised, *see also Task Force Report* at 55-56, we must note that this trend has been the subject of increasing disquietude over the federalization of state common law. *See Sedima,* 105 S. Ct. at 3293 (Marshall, J., dissenting); 131 Cong. Rec. S10285-88 (1985) (Remarks of Sen. Hatch). Many current proposals to curtail civil RICO are directed to precisely this point. For example, Senate Bill 1521, 99th Cong., 1st Sess. (1985), would require at least one predicate act other than mail, wire, or securities fraud to make out a civil RICO claim.

Though the suggestion is not without some merit, we think that characterizing RICO as essentially a fraud action would be to have the tail wag the dog. We reject this approach.

Civil Penalty or Forfeiture

It is also suggested that RICO can be broadly analogized to actions for civil penalty or forfeiture. In Pennsylvania such actions are now governed by a two-year statute of limitations, 42 Pa. Cons. Stat. Ann. § 5524(5) (Purdon Supp. 1985), although at the time these cases were brought, it was a one-year period when brought by private parties, 42 Pa. Cons. Stat. Ann. § 5523(2)(1981).

We do not find this analogy forceful. Civil RICO is clearly not a forfeiture statute—the recovery of a successful private plaintiff is based on the injury sustained ("three-fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"), not on what the defendant has gained through illegal conduct. Nor do we think the treble damage provision is primarily intended as a penalty. *See Task Force Report* at 391. More important, it is an incentive for private attorneys general to bring suit. We would also be concerned that the one-year limitations period that would be applicable to this case if the forfeiture analogy were adopted may, because it is so short, contravene the broad *remedial* purposes of civil RICO. We decline to characterize civil RICO as a penal statute.

42 Pa. Cons. Stat. Ann. § 5524

Section 5524 is a two-year statute of limitations, covering a potpourri of civil actions. It provided at the time relevant to this appeal:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect of or unlawful violence or negligence of another.
>
> (3) An action for taking, detaining or injuring personal property, including actions for specific recov y thereof.
>
> (4) An action for waste or trespass of real property.

(5) An action upon a statute for civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon execution or otherwise in his possession.

It is argued by amicus Congress Financial Corporation that this two-year period should be borrowed for civil RICO because "it is indisputable that almost all, if not all, of the predicate RICO acts . . . would be included, in a civil context, within § 5524."

We find this proposal without merit. The premise that most, "if not all," RICO predicate acts would be covered by this statute is transparently false. Most RICO predicate acts, such as gambling, obstruction of law enforcement, sports bribery, narcotic trafficking, violations of restrictions on payments and loans to unions, interstate transportation of stolen property, or trafficking in contraband cigarettes, simply do not correspond to private causes of action under common law. As one court, seeking to find a civil RICO analogy under Colorado law has stated: "The search for a precise definition may be futile, however, since Colorado's statutes of limitations retain the language of common law forms of action." *Victoria Oil,* 587 F. Supp. at 431.

More fundamentally, this proposal does not even do what *Wilson* commands, i.e., *characterize* the federal cause of action. Rather, it seeks to take advantage of the fortuitous circumstance that a number or potential state law analogies share a common limitations period. Such an approach will provide little guidance for the resolution of this problem in other states, and may prove particularly

vulnerable to changes in the state statute of limitations scheme. We reject this apporoach.

"Catchall" Limitations Period

Like most states, Pennsylvania has enacted a residual "catchall" statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations. It provided at the time this case was filed:

> The following actions and proceedings must be commenced within six years:
>
> . . .
>
> (6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981).[19] In *Wilson v. Garcia,* the Court considered, but rejected, the application of such a catchall statute to § 1983 claims:

> The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many states. Section 1983, of course, is a statute, but it only provides a remedy and does not itself create any substantive rights. . . . Although a few § 1983 claims are based on statutory rights, . . . most involve much more. . . . These guarantees of liberty are among the rights possessed by every individual in civilized society, and not privileges extended to the people by the legislature.

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[19]The current catchall provision is the same in all material respects. 42 Pa. Cons. Stat. Ann. § 5527 (Purdon Supp. 1985).

105 S. Ct. at 1948-49 (footnote omitted).

The Court's reasons for rejecting this analogy in the § 1983 context simply do not apply to RICO. RICO was enacted in 1970, long after statutory causes of action and corresponding catchall limitations periods became commonplace. Thus, it would not be disingenuous (or anachronistic) to suggest that Congress might have approved of borrowing such statutes. Second, RICO is a strictly statutory remedy to enforce statutory rights. Thus, *Wilson v. Garcia* does not foreclose this court from adopting § 5527 for civil RICO actions arising in Pennsylvania.

The A.B.A. Task Force on Civil RICO specifically approved of cases characterizing RICO in this way:

> There are two varying approaches to characterizing RICO claims. Most courts use the state limitations period applicable to state law claims most similar to the *predicate offenses* alleged as part of the RICO claim. These cases in effect assume that the thrust of the RICO claim is to compensate injury caused by the underying predicate offenses. In contrast, a few courts view RICO claims more broadly as a special statutory cause of action as to which the predicate offenses are only one element. These courts opt for the use of a state statute, if available, applying generally to all statutory causes of action that have no express statute of limitations.
>
> The latter approach seems more consistent with the overall concept of RICO than the former. RICO is manifestly directed towards activities that go beyond the mere commission of predicate offenses, and many courts have balked at the concept of RICO as simply a new or alternative civil remedy for the underlying criminal violations.

Task Force Report at 389-91 (emphasis in original). *See also Compton v. Ide,* 732 F.2d 1429 (9th Cir. 1984); *Teltronics Services v. Anaconda-Ericsson, Inc.,* 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd,* 762 F.2d 185 (2d Cir. 1985); *Seawell v. Miller Brewing Co.,* 576 F. Supp. 424 (M.D.N.C. 1983). *See also Durante Brothers, supra,* (applying catchall statute to case before court); *Creamer v. General Teamsters Local Union,* 579 F. Supp. 1284 (D. Del. 1984) (same).

Such an approach, moreover, recognizes that civil RICO is truly *sui generis* and that particular claims cannot be readily analogized to causes of action known at common law—the very observation that led us to search for a uniform limitations period in the first place. And like personal injury statutes. the catchall statutes are particularly unlikely to be fixed in a manner that would discriminate against federal claims. Thus, we hold that civil RICO actions arising in Pennsylvania shall be governed by the six-year limitations period of 42 Pa. Cons. Stat. Ann. § 5527. Because it is clear that the acts relating to the termination of Malley-Duff's agency occurred within six years of the time this action was filed, we will reverse the district court's dismissal of the RICO claims arising out of these alleged acts.[20]

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[20]In the wake of *Sedima,* in which both the majority and dissenting opinions stressed the need for courts to develop a meaningful approach to the RICO requirement of a "pattern" of racketeering activity, defendants have argued that, even if timely, Malley-Duff's RICO claims should be dismissed as failing to allege such a pattern. *Sedima* did not, however, give much guidance as to how "pattern" should be interpreted, other than to suggest that "continuity plus relationship" of predicate acts might be required. 105 S. Ct. at 3285 n.14 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). We have no occasion to define its parameters here. Even under the very restrictive definition of "pattern" defendants would have us adopt, *see Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986), *Northern Trust Bank/O'Hare v. Inryco, Inc.,* 615 F. Supp. 828 (N.D. Ill. 1985), Malley-Duff's allegations

(Continued on next page)

III.

The district court dismissed the RICO claims predicated on the alleged obstructions of justice in *Malley-Duff I* because, it held, interference with a lawsuit did not constitute an injury to "business or property" within the meaning of RICO. We believe, especially in light of the Supreme Court's intervening decision in *Sedima,* that this constituted reversible error.

The district court relied on the analysis of Judge Garrity in *Van Schaick v. Church of Scientology,* 535 F. Supp. 1125 (D. Mass. 1982), wherein he concluded that "persons injured in their business or property" should be read as meaning "business persons engaged in conventional commercial activity who allegedly suffered commercial injury" and that civil RICO should be "confine[d] . . . to business loss from racketeering injuries." 535 F. Supp. at 1136-37. Interference with a lawsuit, the district court here said, was not such an injury. It went on to state that there were sound policy reasons for construing RICO as not permitting this claim: "There are other remedies available to plaintiff for such wrongs; *e.g.,* discovery sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's 'property'. An enormous multiplicity of suits could result from holding otherwise." App. at 20a.

Though the district court's concerns are substantial ones, we do not believe its analysis can be squared with RICO as it is written or as construed in *Sedima.* If RICO's reference to injury to "business *or* property" is to be given

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(Continued)
of similar conduct in Cleveland, Chicago and other cities seems to us a sufficient pleading of a "pattern" of racketeering injury.

meaning, RICO standing cannot be limited to "business" injuries only. We would certainly think, for example, that an individual harmed in his or her personal property by loansharking activities should have a civil remedy under RICO. A cause of action, of course, if a form of "property," and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as "business injury." The unwritten "racketeering injury" requirement—analogous to the requirement of competitive injury for antitrust standing—was specifically addressed, and rejected, by the Supreme Court in *Sedima*:

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. 741 F.2d, at 487. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Ibid.* Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* [747 F.2d 384, 398 (7th Cir. 1984)].
>
> It is true that private civil actions under the statute are being brought almost solely against such

> defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.
>
> We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. See generally [*Task Force Report*] at 55-69. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

105 S. Ct. at 3287 (footnote omitted).

Nor do we agree with the district court that because litigants have other potential remedies for obstructive conduct such as that alleged here, there can be no remedy under RICO. We must assume that by including obstruction of justice among the RICO predicate acts, Congress envisioned the statute being used, where all other requirements are met, to supplement remedies already available for such conduct.[21] Certainly, the possibility of a criminal

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[21]Defendants argue that Malley-Duff should be denied a RICO remedy becuase it opted not to pursue a motion for sanctions within the

(Continued on next page)

prosecution cannot be sufficient reason for denying a civil RICO remedy—such a rule would eviscerate civil RICO entirety, since all predicate acts are, by definition, crimes. *See* footnote 1 *supra*. We hold that Malley-Duff's allegations of "great expenses, delays and inconvenience . . . in its prosecution of the First Lawsuit" were a sufficient pleading of injury to business or property to give Malley-Duff RICO standing. *See also Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985).

IV.

Count V of Malley-Duff's complaint, based on 42 U.S.C. § 1985(2), *see* footnote 2 *supra*, alleged intimidation of a trial judge, intimidation of plaintiff's counsel, intimidation of witnesses, destruction of evidence, and subornation of perjury, all in the context of the pretrial stages of *Malley-Duff I*. Rely on this court's decisions in *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976), where we held that only acts *directly* affecting parties, witnesses or jurors—and not other acts that may merely influence the proceedings—are cognizable under this statute, the district court summarily dismissed all but the witness intimidation allegations. Malley-Duff does not seem to seriously challenge this holding, and we affirm it.

The district court went on, however, to dismiss the remaining § 1985(2) allegations on the ground that the complaint did not allege that any witness was actually deterred from testifying "in court," but rather complained of delays, expenses, inconvenience, and the suppression of evidence during the pretrial phase. We think this is a

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(Continued)
context of *Malley-Duff I*. This seems to us a question of causation of damages, rather than a question of the type of conduct remediable under RICO. The district court may address the causation issue on remand.

crabbed and unwarranted reading of the statute. the language "in any court" is not as plain as the district court seemed to surmise and cannot be read so literally—a case may be described as "in" a certain court, even though no actual "courtroom" proceedings take place. Similarly, we think that a person asked to provide discovery in such a case, regardless of where or in what form, is for these purposes a witness "in" the court. Indeed, the statute distinguishes between being deterred from "attending such court" and from "testifying to any matter pending therein." As a policy matter, we think the statute's less than pellucid language should be read with a view to the fact that pretrial proceedings in 1870 did not have the importance they have today. Because cases can be won or lost, or their value substantially diminished, as a result of intimidation that affects witnesses' willingness or ability to provide discovery, we hold that the statute applies.[22]

The case the district court relied on in holding that pretrial intimidation does not give rise to a cause of action under § 1985(2) is not on point. *Kimble v. D.J. McDuffy, Inc.* 648 F.2d 340 (5th Cir.)(in banc), *cert. denied*, 454 U.S. 1110 (1981) involved a claim that employees were terminated for having filed worker's compensation claims. The statute refers to retaliation for giving testimony, not for the filing of complaints. Thus, the Fifth Circuit could not square the case before it with the language of the statute.

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[22]*See also* Chahal v. Paine Webber, 725 F.2d 20, 24 (2d Cir. 1984):

> The statute does not define the term "witness." However, Congress' purpose, which was to protect citizens in the exercise of their constitutional and statutory rights to enforce laws enacted for their benefit, is achieved by interpreting the word "witness" liberally to mean not only a person who has taken the stand or is under subpoena but also one whom a party intends to call as a witness. Deterrence or intimidation of a potential witness can be just as harmful to a litigant as threats to a witness who has begun to testify.

A case closer to this one is *Chahal v. Paine Webber*, 725 F.2d 20 (2d Cir. 1984), where the § 1985(2) claim alleged that the defendants had conspired to intimidate an expert witness into withdrawing from the case. The underlying case had not gone to trial when the § 1985(2) claim was brought, but nonetheless the court of appeals found a claim stated. Contrary to the district court here, which held that the only cognizable injuries are the actual failure of a witness to appear at trial, resulting in diminished recovery or loss of a lawsuit, the Second Circuit found it sufficient to allege as injury "the $1,410 paid to [the expert] for his services and cost of preparing him to assist in [the underlying] action. In any event one need not suffer monetary damage to prevail in an action for denial of civil rights." 725 F.2d at 24.

We agree with the Second Circuit that "[t]he essential allegations of 1985(2) claim of witness intimidation are (1) a conspiracy between two or more persons (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiffs." 725 F.2d at 23. *See also Miller v. Glen & Helen Aircraft*, 777 F.2d at 498. Under this standard, Malley-Duff's allegations are sufficient to state a § 1985(2) claim of witness intimidation.[23]

V.

Having dismissed all of Malley-Duff's federal claims, the district court exercised its discretion and dismissed its pendent state claim for civil conspiracy as well. Because we

[23]The district court stated that even if its interpretation of § 1985(2) was erroneous, as we have now held, "plaintiff's action *may* yet be barred by the statute of limitations." (Emphasis added.) This does not quite rise to the level of an alternative holding, and we do not find sufficient material in this record to make this determination ourselves. Nor has the issue been argued or briefed. We will therefore leave this issue open on remand.

reverse the dismissals of the federal claims, we will also reinstate the pendent claim for further consideration, intimating no view as to its sufficiency, timeliness, or merits.

CONCLUSION

For the reasons stated in the foregoing opinion, we will reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

SLOVITER, *Circuit Judge*, Concurring in the judgment.

I join in Parts I, III, and IV of the majority opinion. As set forth in my concurring opinion in *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, Nos. 85-3380, 85-3366, filed today, I disagree with the majority's approach in looking to state statutes of limitations to find one applicable to civil RICO claims. Instead, I would apply the four year statute set forth in section 4 of the Clayton Act, 15 U.S.C. § 15b. The argument that a federal statute of limitations should govern was not presented by plaintiffs in this action. Nonetheless, my comments in *A.J. Cunningham* are equally applicable to the issue presented here.

Because the plaintiffs in this case filed their complaint within four years of the date that their claim accrued, I agree with the majority that their complaint was filed timely and I therefore concur in the majority's reversal of the judgment of the district court and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.
Appellant

v.

CROWN LIFE INSURANCE CO., a Corp.
AGENCY HOLDING CORP, an Illinois Corp.
AGENCY HOLDING CORP, an Ohio Corp.
CLARKE BURTON LLOYD, individual
KERRY PATRICK CRAIG, individual
DIANE PARIANO, individual
EHRMAN RATINI OGLEVEE & CRAIG INC.,
a Pennsylvania Corporation
ROBERT OGLEVEE, individual

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges.*

The petition for rehearing filed by appellees, Crown Life Insurance Company and Clarke Burton Lloyd, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

. . /s/ A. LEON HIGGINBOTHAM, JR. . . .
A. Leon Higginbotham, Jr.
Circuit Judge

Dated: July 1, 1986

B-3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3228

MALLEY-DUFF & ASSOCIATES, INC.
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v.

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SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges.*

The petition for rehearing filed by appellees, Agency Holding Corp. Illinois, Agency Holding Corp. Ohio, Kerry Patrick Craig, Diane Pariano, Ehrman Ratini Oglevee & Craig, Inc., and Robert Oglevee, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM, JR.
A. Leon Higginbotham, Jr.
Circuit Judge

Dated: July 1, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF
ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARK BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual,

Defendants.

Civil Action
No. 81-439

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff brings this suit to recover damages allegedly incurred as the result of (1) defendants' violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et. seq.* (hereinafter referred to as "RICO"), (2) defendants' violation of plaintiff's civil rights under 42 U.S.C. § 1985(2), and (3) a civil conspiracy by the defendants to interfere with plaintiff's rights. Defendants

have moved for summary judgment, which this Court will grant.

I. RICO Counts

In Counts 1 through 4, the plaintiff asserts violations of RICO, which provides civil remedies in the form of treble damages for "[a]ny person injured in his business or property by reason of a violation." 18 U.S.C. § 1964(c). The word "person" includes the plaintiff corporation. 18 U.S.C. § 1961.

Plaintiff contends that defendants Lloyd, Craig and Crown Life Insurance Company (hereinafter referred to as "Crown") associated themselves as an enterprise for the purpose of taking over various Crown insurance agencies that had lucrative territories in the United States. (Complaint, ¶18). Plaintiff alleges that defendants used mail and wire communications and travel in interstate and foreign commerce to accomplish their goal. The takeover scheme consisted of the setting in 1977 of a sham production quota too high to be met and the seizing of the agency by defendants in 1978 when it failed to meet the quota. These allegations also form the basis of a complaint filed on April 5, 1978, at Civil Action No. 78-373 (hereinafter referred to as the "1978 lawsuit").

Plaintiff further alleges that the defendants obstructed justice by intentionally interfering with plaintiff's prosecution of the 1978 lawsuit. Specifically, plaintiff charges the defendants with (1) destruction of evidence, (2) circulation of false and defamatory information to the media about the judge who was originally assigned to the 1978 suit, (3) subornation of perjury, (4) tampering with a witness, (5) perjury, and (6) obstruction of a U.S. Marshal in the performance of his duties.

The injuries alleged by plaintiff fall into two categories: (1) business injuries which are alleged in the 1978 lawsuit, and (2) injuries caused by defendants' obstruction of justice. Defendants move for summary judgment on the ground that any claim for injuries to the business is beyond the statute of limitations, and any claim for injuries caused by the obstruction of justice falls outside the scope of RICO or, alternatively, is barred by the statute of limitations.

A. Business Injuries: Statute of Limitations

The parties agree that suits under RICO are governed by the limitations period of the most analogous cause of action under Pennsylvania law. (Defendants' brief, p. 9; plaintiff's brief, p. 86). Plaintiff argues, and this Court agrees, that the RICO claims for business injuries set forth in Counts 1 through 4 are most analogous to a common law fraud action in Pennsylvania. (Plaintiff's brief, p. 90). However, this Court disagrees with plaintiff's conclusion that the applicable statute of limitations for fraud actions is six years.

The plaintiff cites *Sharp v. Coopers & Lybrand,* 649 F.2d 175, 191-192 (3d Cir. 1981), *cert. denied,* 455 U.S. 938 (1982), for the proposition that fraud "falls within the catch-all provision of Pennsylvania's six-year statute of limitations." (Plaintiff's brief, p. 90). Clearly, that is *not* the holding in the *Sharp* case. The plaintiff filed suit on May 4, 1975, in the *Sharp* case. The applicable statute of limitations was six years at the time the suit was commenced in *Sharp.* Pa.Stat.Ann. Tit. 12, § 31 (Purdon 1953). This statute has since been repealed and replaced by 42 Pa.C.S.A. §§ 5521-5536 (1978). In holding that the six-year statute of limitations for common law fraud applied in *Sharp,* the

Court cited its previous holding in *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980). The Court noted in *Biggans* that, since June 27, 1978, the date on which the Judicial Code establishing a new limitations scheme became effective, it has been unclear whether the two-year period under § 5524(3) or the six-year catch-all provision under § 5527(6) applies to common law fraud actions. *Biggans*, 638 F.2d at 607 n. 2. The Court did not resolve the issue in *Biggans* because the plaintiff had filed suit prior to the effective date of the Judicial Code. Plaintiff filed suit in this action on March 20, 1981; the Judicial Code clearly applies to plaintiff's action.

Two courts have addressed the question of which limitation period applies. In *Bickell v. Stein*, 291 Pa. Super. 145, 435 A.2d 610 (1981), the Pennsylvania Superior Court upheld a lower court's dismissal of an action alleging fraud and interference with contractual relations on the ground that the action "was not commenced within the two-year period provided by the *applicable* statute, 42 Pa.C.S.A. § 5524(3) and (4)." *Id.* at 149, 435 A.2d at 612[1](emphasis added). In *Fickinger v. C. I. Planning Corp.*, 556 F. Supp. 434 (E.D. Pa. 1982), Judge Shapiro reviewed the legislative policy behind revision of the statutes of limitation in Pennsylvania and concluded that the two-year period set forth in 42 Pa.C.S.A. § 5524(3) controls. This Court agrees that the two-year period is applicable to common law fraud actions.

Although the start of the statutory limitation may be delayed by plaintiff's ignorance of the injury and its operative cause, *Bickel*, 291 Pa. Super. at 149-150; 435 A.2d at

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[1] 42 Pa.C.S.A. § 5524(3) provides that "[a] action for taking, detaining or injuring personal property, including actions for specific recovery thereof" must be commenced within two years.

612, plaintiff clearly cannot plead such ignorance as to its business injuries. As stated previously, the plaintiff pleaded fraudulent termination of the agency by use of a sham production quota in a case filed in 1978. Thus, the claim for injury to the business through termination and loss of vested renewal premiums is clearly barred by the statute of limitations.

B. Injuries Caused by Interference with Lawsuit: Scope of RICO

With respect to the claim for injuries caused by obstruction of justice through intentional interference with plaintiff's prosecution of the lawsuit, defendants argue that such injuries do not fall within the scope of RICO. Plaintiff seeks recovery under 18 U.S.C. § 1964(c), which provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Counts 1 through 4 incorporate allegations that the defendants violated subsections (d), (c), (b), and (a) of § 1962, respectively.

The issue is whether interference with plaintiff's 1978 lawsuit is an injury to the plaintiff's "business or property" within the meaning of RICO. This Court agrees with the analysis of District Judge Garrity in *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1136-1137 (D. Mass. 1982):

> [Section 1964(c)] extends a treble damage remedy to any person injured in "business or property" by a

violation of § 1962. Little legislative history exists on the clause. But courts which have recently considered § 1964(c) have interpreted it narrowly . . . They have consistently concluded that § 1964(c) must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state courts . . . Just as in the antitrust context the Supreme Court has held that the Clayton Act's treble damage provisions are available to remedy only "injury of the type the antitrust laws were intended to prevent," . . . so, too, § 1964(c) addresses only a specific sort of injury arising out of racketeering . . . Indeed, it is telling that whereas RICO's other criminal and civil penalties apply generally to violations of § 1962, the remedy which § 1964(c) prescribes extends only to persons who suffer a specific injury, viz., to their business or property.

* * *

The cases in which courts held that plaintiffs have, or but for some other defect could have, stated a claim under § 1964(c) have involved business persons engaged in conventional commercial activity who allegedly suffered commercial injury.

* * *

To be sure, RICO uses the disjunctive in referring to "business or property." Yet we believe that phrase must be read with the statute's primary purpose—to protect legitimate businesses from infiltration by racketeers—in mind . . . [W]e believe courts should confine § 1964(c) to business loss from racketeering injuries.

(Citations omitted). *See also Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449, 457 (7th Cir. 1982).

The injury suffered by plaintiff as the result of interference by the defendants with its 1978 lawsuit is not a business injury within the meaning of RICO. Futhermore, there are sound policy reasons for construing the statute as not permitting plaintiff to file a separate suit under RICO for injuries which allegedly resulted from defendants' obstruction of justice in its 1978 lawsuit. For the same reasons that no cause of action is available to a party who alleges that perjured testimony in a prior case caused him injury, no separate civil cause of action under RICO should be permitted for opprobrious conduct during the litigation of a single case. There are other remedies available to plaintiff for such wrongs; e.g., discovery sanctions, evidentiary inferences in the original suit, contempt citations, and referral to the proper authorities for criminal investigation. The lure of lucrative treble damages under RICO is too great to permit recovery for such conduct as an injury to the person's "property." An enormous multiplicity of suits could result from holding otherwise.

II. Section 1985(2) Claim

In Count 5, plaintiff alleges that defendants Lloyd, Craig, Crown, Pariano, Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio "formed a conspiracy to obstruct justice and to violate plaintiff's civil rights in connection with the [1978 lawsuit]." (Complaint, ¶34). Plaintiff alleges the following acts were committed by the defendants in furtherance of the conspiracy: (1) the hiring of a private investigator to follow the judge who was initially assigned to this case in an effort to find a basis for seeking his recusal; (2) the hiring of a private

investigator to follow plaintiff's counsel "to intimidate plaintiff's counsel with respect to his representation of plaintiff in the [1978 lawsuit]"; (3) threats and intimidation of witnesses and an attempt to prevent them from testifying; (4) destruction of relevant documents in the 1978 lawsuit, and (5) subornation of perjury. In paragraph 39 of the complaint, plaintiff alleges that such acts "constitute a conspiracy to deter, by intimidation and threat, Plaintiff and witnesses in the [1978 lawsuit] from prosecuting that action and from testifying therein in violation of 42 U.S.C. § 1985." Defendants move for dismissal on several grounds: (1) the plaintiff's failure to allege class-based animus; (2) plaintiff's failure to allege a cause of action under § 1985(2); (3) the lack of cognizable injury under § 1985; and (4) the statute of limitations.

Although plaintiff does not specifically state whether it is proceeding under the first or second clause of § 1985(2), the language of paragraph 39 closely tracks the first clause. Furthermore, no cause of action would lie under the second clause of § 1985(2) because the Supreme Court has clearly stated that the second clause "applies to conspiracies to obstruct the course of justice in state courts." *Kush v. Rutledge*, ____ U.S. ____, 103 S. Ct. ____, 75 L.Ed.2d 413, 419 (1983). Also, the Court implied that a cause of action under the second clause, unlike a cause of action under the first clause, would require a showing of class-based, invidiously discriminatory animus. *Id.* Since plaintiff did not allege interference with a state court proceeding nor class-based discriminatory animus, the Court concludes that no cause of action has been alleged under the second clause of § 1985(2). *See Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

The first clause of § 1985(2) provides as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . .

In *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976), the Third Circuit upheld the dismissal of a complaint for failure to state a cause of action under § 1985(2) brought by two persons convicted of transporting stolen United States treasury bills. The plaintiffs had alleged that the prosecuting attorney conspired with a co-defendant who pled guilty "to secure the convictions of plaintiffs with the knowing use of false and perjured testimony." *Id.* at 832. The Third Circuit reasoned that, although such an allegation could be construed as stating a cause of action under the first clause of § 1985(2) which prohibits "conspir[ing] to . . . influence the verdict . . . or indictment of [the] grand or petit juror[s]," such a construction would be "impermissibly generous." *Id.* at 840. Instead, the Third Circuit concluded that the first clause of § 1985(2) "concern[s] itself with conspiratorial conduct that *directly* affects or seeks to affect parties, witnesses, or grand or petit jurors."

Using this analysis as a guide, the Court will now scrutinize plaintiff's allegations in Count 5. Four of plaintiff's allegations clearly fall outside the scope of § 1985(2):

intimidation of the presiding Judge, intimidation of plaintiff's counsel, destruction of relevant evidence, and subornation of perjury. The allegation that plaintiff's witnesses were intimidated, however, requires closer examination. Defendants raise two specific arguments with respect to these allegations: (1) only the person deterred from attending or testifying in court, or injured as a result of attending or testifying in court, may bring an action; and (2) alternatively, § 1985(2) does not apply to prosecution of an action, but rather to actual attendance or testimony in court. Plaintiff has not alleged injury on account of the failure of a witness to appear in court or the presentation of false testimony in court as a result of defendants' actions.

Defendants' first argument, that only the person deterred has standing, has been addressed by two district courts. In *Burch v. Snider,* 461 F. Supp. 598, 600 (D. Md. 1978), Chief Judge Northrop held that the language of § 1985(2) "creates a cause of action for 'parties' only insofar as they are themselves deterred from or injured on account of testifying or attending federal court. The plain words of the statute do not give parties a right to sue based on intimidation of their witnesses." In *Kelly v. Foreman,* 384 F. Supp. 1352, 1353 (S.D. Texas 1964), District Judge Singleton focused instead upon the remedial language of the statute. Section 1985(3) provides as follows:

> In any case of conspiracy set forth in [§ 1985], if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so

> injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivaiton, against any one or more of the conspirators.

Judge Singleton held that the statute clearly creates a cause of action for any person injured in the course of the alleged conspiracy. This interpretation better serves the effectuation of § 1985's purposes. In almost every case, it will be the *party* who suffers injury as a result of the intimidation of witnesses. What damages can the *witness* who was deterred from testifying claim? Thus, this Court concludes that a party may claim injury based on the intimidation of his witnesses.

Defendants' second argument, that § 1985 does not apply to prosecution of an action, was addressed by the Fifth Circuit Court of Appeals *en banc* in *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (1981). The Fifth Circuit upheld a summary judgment in favor of an employer where plaintiffs claimed that they were fired as a result of filing workmen's compensation claims. In reaching its decision, the Fifth Circuit made the following comments regarding § 1985(2):

> Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that threatened the attempt to create a political environment hospitable to equality . . . " In light of the acts of violence that threaten the sanctity of federal courts, Congress meant Section 1985(2) to protect a party based on his physical presence while attending or testifying in court. In this case, no allegations were made that plaintiffs were injured because they attended or testified in federal court . . . [Section 1985] was intended to protect against direct violations of a party or witness's right to attend or testify in federal

> court. This clear congressional purpose is best served by construing the statutory language in its ordinary meaning so that only direct interference with a federal court if prohibited.

Id. at 348 (citations omitted); *cf. Keating v. Carey,* 706 F.2d 377, 386 n. 13 (2nd Cir. 1983).

In order for plaintiff to establish a cause of action under § 1985(2), plaintiff must show that an act in furtherance of the object of the conspiracy caused injury to the plaintiff through direct interference with a federal court. Thus, the plaintiff must allege injury occasioned by (1) a conspiracy to deter plaintiff from attending or testifying truthfully, or (2) deterrence of one of plaintiff's witnesses which resulted in the witness's failure to attend court or to testify in court truthfully, with plaintiff's consequent loss of a court action or diminishment of recovery, or (3) injury to the plaintiff on account of having attended court or having testified in the 1978 lawsuit. Plaintiff claims as its injuries expenses and delays in the pretrial stages of its 1978 lawsuit and the suppression of relevant and material evidence during the discovery phase of that action.[2]

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[2] Since the filing of this complaint, plaintiff has tried and won its 1978 lawsuit, though an appeal is pending. Plaintiff has not sought to amend its complaint to allege that any witness failed to appear or to testify truthfully in the trial of that suit as a result of defendants' actions, nor has the plaintiff submitted any affidavit, claiming such an injury, subsequent to the trial of the 1978 lawsuit. The fact that plaintiff won its 1978 lawsuit despite defendants' obstructions of justice (assumed to be true for purposes of this motion) reaffirms the need to limit § 1985(2) to direct interferences with federal court. Perhaps plaintiff's witnesses were *not* deterred from appearing *in court* or testfying truthfully *in court:* that is the only injury § 1985(2) is intended to remedy. Furthermore, it does not make sense to allow recovery for pretrial obstructions of justice in a case which plaintiff may eventually win, in part, through effective use of inferences to be drawn from those same obstructions of justice.

(Complaint, ¶40). Thus, plaintiff has failed to allege a cognizable injury under § 1985(2).[3]

III. Civil Conspiracy

In Count 6, plaintiff alleges a civil conspiracy at common law. With the dismissal of Counts 1 through 5, there remains no basis for the exercise of federal jurisdiction. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966).

An appropriate Order will be issued.

Date: March 23, 1984 .../s/ ALAN N. BLOCH...

cc: Counsel of record.

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[3]Obviously, by this reasoning, plaintiff's cause of action for intimidation of anyone other than plaintiff cannot arise prior to trial of the action. If the Court has erred and plaintiff does indeed have a cause of action for expenses and delays occasioned by defendants' deterrence of plaintiff's witnesses at the pretrial stage, then the plaintiff's action may yet be barred by the statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF
ASSOCIATES, INC.,

Plaintiff,

vs.

CROWN LIFE INSURANCE CO., a corporation, AGENCY HOLDING CORP., an Illinois corporation, AGENCY HOLDING CORP., an Ohio corporation, CLARKE BURTON LLOYD, an individual, KERRY PATRICK CRAIG, an individual, DIANE PARIANO, an individual, EHRMAN RATINI OGLEVEE & CRAIG, INC., a Pennsylvania corporation, and ROBERT OGLEVEE, an individual,

Defendants.

Civil Action
No. 81-439

JUDGMENT ORDER

AND NOW, this 23rd day of March, 1984, upon consideration of the Motion for Summary Judgment filed by all Defendants on July 29, 1982,

IT IS HEREBY ORDERED that said Motion is GRANTED and that judgment be, hereby is, entered in favor of Defendants and against Plaintiff.

/s/ ALAN N. BLOCH
United States District Judge

cc: H. Woodruff Turner and
David Borkovic, Esquires
1500 Oliver Building
Pittsburgh, PA 15219

Alexander Black, Esquire
57th Floor, U.S. Steel Building
Pittsburgh, PA 15219

John H. Bingler, Jr., Esquire
8th Floor, One Riverfront Center
Pittsburgh, PA 15222

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.
a corporation,
Plaintiff,
vs.

CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

NOTICE
and
MOTION FOR SUMMARY JUDGMENT

Please take Notice that the following Motion for Summary Judgment will be filed with the Clerk of Court on July 29, 1982.

THORP, REED & ARMSTRONG

By: ..../s/ JOHN H. BINGLER, JR.....
John H. Bingler, Jr.

By: ...../s/ GLENN E. BOST, II.....
Glenn E. Bost, II

Attorneys for Defendants,
Agency Holding Corporation, an
Illinois Corporation, Agency
Holding Corporation, an Ohio
Corporation, Kerry Patrick
Craig, Diane Pariano, Ehrman
Ratini Oglevee & Craig, Inc.,
and Robert Oglevee

MOTION FOR SUMMARY JUDGMENT

Agency Holding Corporation (Illinois), Agency Holding Corporation (Ohio), Ehrman Ratini Oglevee & Craig, Kerry Patrick Craig, Robert Oglevee and Diane Pariano (hereinafter the "Agency defendants"), by their attorneys move the Court for summary judgment. This motion applies only to plaintiff's 1981 Complaint. The Agency defendants adopt by reference the Motion for Summary Judgment filed by defendants Crown Life Insurance Company (hereinafter "Crown") and Clarke Burton Lloyd applicable to Plaintiff's 1978 Complaint.

Preliminary Statement

Background

On or about January 11, 1978, Crown notified plaintiff that its General Agency Agreement would be terminated, effective in one month. (Craig Affidavit attached hereto para. 7 and Exhibit B thereto.) On February 10, 1978, plaintiff sued in state court for preliminary and permanent injunctions against the termination. When plaintiff's request for a preliminary injunction was denied plaintiff abandoned its state court action and in April 1978, sued in this Court.

In this 1978 suit plaintiff's Complaint alleged antitrust violations, tortious interference, breach of contract, etc., and sought an injunction against the termination and damages for injuries resulting from the termination. Defendants' Answers alleged that the termination was lawful and pursuant to the General Agency Agreement and was prompted by plaintiff's inadequate performance and failure to meet a reasonable production standard for 1977 (Answer of defendants Crown & Lloyd — Third Defense),

which was lower than production achieved by plaintiff in a number of years prior to 1977 (Craig Affidavit para. 3; February 1978 Common Pleas Hearing transcript attached hereto at p. 125 and Exhibit A thereto). Plaintiff's Complaint had alleged that the production standard was unrealistic and unreachable.

Almost three years later, in March, 1981, plaintiff again sued in this Court, alleging RICO and Civil Rights claims and a pendent common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to support its RICO claim by alleging, for the first time, that Crown's 1977 production standard was fraudulent and therefore constituted mail and wire frauds (RICO predicate offenses). It also alleges that plaintiff was defrauded of vested renewal commissions to which it was entitled. There is no evidence to support the allegation that plaintiff lost any vested renewal commissions (Craig Affidavit para. 8).

Plaintiff's 1981 Complaint attempts to support both its RICO and Civil Rights claims by alleging that during the discovery phase of the 1978 suit defendants engaged in various obstructions of justice (RICO and Civil Rights Act violations). The 1981 Complaint alleges that these obstructions, which occurred well after the termination, injured plaintiff by causing it "great expenses, delays and inconvenience [in its 1978 case and by denying plaintiff] Relevant and material evidence [in its 1978 case]."

In 1979, plaintiff had sought relief from the alleged obstructions of justice by way of a Motion for Sanctions filed in the 1978 suit. This Motion was voluntarily abandoned by plaintiff after the 1981 suit was filed. A four day

hearing on plaintiff's 1979 Motion for Sanctions was interrupted in June of 1979, when the then-presiding judge referred plaintiff's allegations to the U.S. Attorney for investigation. In 1981, the U.S. Attorney reported to this Court that no prosecution was contemplated.

Summary of Defendants' Arguments

Plaintiff has not been injured by any RICO or Civil Rights violations. Both RICO and the Civil Rights Act give causes of action to persons injured by activities the Acts prohibit; but plaintiff has not been injured by activities prohibited by RICO or the Civil Rights Act.

This is so because the only injury actually suffered by plaintiff was not caused by an activity prohibited by RICO or the Civil Rights Act. There is simply no causal connection between any allegedly wrongful activity of defendants and the only injury actually suffered by plaintiff for which the law might provide a remedy, namely, the termination of its General Agency Agreement in February, 1978. All of the obstructions of justice alleged in the 1981 Complaint, which, if proved, might constitute RICO and Civil Rights violations, took place after the termination and therefore could not have caused it. There is no evidence to show that a conspiracy to commit the alleged obstructions of justice antedated the termination.

The 1981 Complaint attempts to overcome this causation problem by claiming that the 1977 production standard, which caused the termination, constituted mail and wire frauds (RICO predicate offenses). Plaintiff may hope to prove that the standard was unrealistically high or unreachable, but there is no evidence that any fraud was involved. There were simply no misrepresentations.

Parenthetically, even if the production standard can somehow br tortured into a mail or wire fraud, any 1981 suit seeking recovery for the termination in 1978 is barred by the state statute of limitations applicable to civil RICO actions. This bar applies with equal force to plaintiff's common law conspiracy claim.

Plaintiff's 1981 Complaint attempts to overcome the absence of a causal connection between an activity prohibited by RICO or the Civil Rights Act and legally actionable injury to plaintiff, by alleging as injuries the "great expenses, delays and inconvenience . . . imposed upon Plaintiff in its" 1978 case, and the denial of "Relevant and material evidence" in this 1978 case (hereinafter referred to as "lawsuit injuries").

These alleged "lawsuit injuries" are simply not injuries recognized as actionable by the common law or RICO or the Civil Rights Act. The law simply does not recognize a separate cause of action for "lawsuit injuries" which could be remedied by sanctions available during a pending lawsuit. If it did, parties would thereby be afforded the option of either pursuing sanctions for the "lawsuit injuries" discovered during the pendency of a lawsuit or bringing separate common law or RICO or Civil Rights suits. Failing to pursue available sanctions could distort the outcome of a pending lawsuit. Opting to refrain from pursuing available sanctions would be the actual cause of the "lawsuit injuries" since they could have been avoided or eliminated by sanctions. Furthermore, parties to lawsuits could convert any serious discovery dispute in federal or state court into a common law conspiracy, RICO or Civil Rights suit.

In addition, RICO provides remedies only for commerical or competitive injuries, not "lawsuit injuries". The

Civil Rights Act in pertinent part provides remedies only when parties or witnesses are subjected to intimidation or threats. There is no evidence of intimidation or threats in this case even though plaintiff's 1981 Complaint makes this allegation.

To recover under the Civil Rights Act a plaintiff must prove that he was personally subjected to intimidation or threats, and that defendant was motivated by a class based animus. Plaintiff's Complaint does not allege the second element, and there is no evidence to support the first.

Even if RICO provided a cause of action for "lawsuit injuries", plaintiff's claims for these injuries are barred by the one year state statute of limitations applicable to civil RICO claims. Plaintiffs cause of action arose, if at ail, in 1979 and was not sued on until 1981.

If the Court grants summary judgment against plaintiff's RiCO and Civil Rights claims, it should dismiss the common law conspiracy claim because of a lack of any basis for asserting pendent jurisdiction.

Finally, the court should grant summary judgment in favor of individual defendant Pariano because there is no evidence that she participated in or caused the termination of plaintiff's General Agency Agreement (Pariano Affidavit attached hereto).

I. Motion For Summary Judgment On Plaintiff's RICO Claims

1. Plaintiff filed its' 1981 Complaint on March 20, 1981.

2. Counts 1 through 4 of plaintiff's Complaint assert causes of action based on section 1964(c) of the RICO statute, 18 USC § 1964(c) (1970).

3. RICO section 1964(c) gives a cause of action to "Any person injured in his business or property by reason of a violation of section 1962 . . . ."

4. Plaintiff has not been injured in its business or property by any RICO violation.

5. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February 1978.

6. RICO does not provide a remedy or recognize as actionable injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience . . . imposed . . . in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence . . . in [the pending 1978 suit]."

7. RICO provides a remedy only for commercial or competitive injury to "business or property."

8. There is no evidence that any RICO violation occurred prior to the termination or caused it.

9. The 1977 performance standard alleged in the Complaint as a mail or wire fraud was not a fraud or a RICO violation.

10. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

11. The incidents which are alleged in the Complaint to be obstructions of justice all occurred subsequent to the termination and did not cause it.

12. Counts 1 through 4 of the Complaint are barred by the state statute of limitations applicable to private RICO actions, 42 Pa. C.S.A. § 5523(2).

13. Plaintiff's RICO actions accrued, if at all, more than one year prior to the filing of its' 1981 Complaint, and are therefore barred by the applicable state statute of limitations.

14. The statute of limitations on private RICO actions runs from the last act committed as part of a pattern of racketeering activity which causes injury to a plaintiff's business or property.

15. The last act committed as part of an alleged pattern of racketeering activity which caused legally actionable injury to plaintiff's business or property was the termination of plaintiff's General Agency Agreement in February, 1978.

16. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Counts 1 through 4 of plaintiff's Complaint.

II. Plaintiff's Civil Rights Claims

17. Count 5 of plaintiff's 1981 Complaint asserts a cause of action based on section 1985 (2) of the Civil Rights Act, 42 USC § 1985 (2).

18. Section 1985 (2), in pertinent part, prohibits conspiracies

> to deter, by ... intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying ... freely, fully, and truthfully....

and gives a cause of action to anyone

injured in his person or property ... for the recovery of damages, occasioned by such injury ... against any one or more of the conspirators.

19. Count 5 asserts that defendants conspired "to deter, by intimidation and threat, plaintiff and witnesses in [the pending 1978 lawsuit] from prosecuting that action and from testifying therein ...."

20. The only injuries asserted by plaintiff in Count 5 are the same "lawsuit injuries" claimed in the RICO counts, Counts 1-4—"expenses, delays and inconvenience ... imposed ... in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence ... in [the pending 1978 suit]".

21. The Civil Rights Act does not provide a remedy or recognize as injuries the "lawsuit injuries" alleged in the Complaint.

22. The Civil Rights Act in pertinent part provides a remedy only against persons who conspire to deter any party or witness by intimidation, or threat. There is no evidence that defendants participated in such a conspiracy.

23. The Civil Rights Act in pertinent part provides a remedy only for plaintiffs who are personally subjected to intimidation or threats. There is no evidence that plaintiff was so subjected.

24. The Civil Rights Act in pertinent part provides a remedy only where defendants were motivated by a class based animus. Plaintiff's Complaint does not allege this essential element.

25. Count 5 of the Complaint is barred by the state statute of limitations applicable to Civil Rights actions, 42 Pa. C.S.A. § 5524.

26. Plaintiff's Civil Rights action accrued, if at all, more than two years prior to the filing of its' 1981 Complaint, and is therefore barred by applicable statute of limitations.

27. The statute of limitations on Civil Rights actions runs from the last act committed as part of a conspiracy which causes injury to plaintiff.

28. The last acts committed as part of an alleged conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency Agreement in February 1978.

29. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 5 of plaintiff's Complaint.

III. Plaintiff's Common Law Conspiracy Claims

30. Count 6 of plaintiff's Complaint asserts a cause of action based on the common law of conspiracy with jurisdiction allegedly based on pendent jurisdiction principles.

31. Conspiracy law gives a cause of action to persons injured by common law conspiracies.

32. Plaintiff has not been injured by any common law conspiracy.

33. The only injury alleged in the Complaint to have been caused by wrongful activity of the defendants, and actually suffered by plaintiff, for which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

34. The common law of conspiracy does not provide a remedy or recognize as actionable injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and

inconvenience ... imposed ... in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence ... in [the pending 1978 suit]."

35. There is no evidence that any common law conspiracy existed prior to the termination or caused it.

36. The 1977 performance standard alleged in the Complaint as a fraud was not a fraud.

37. Plaintiff's failure to meet this performance standard in 1977 caused plaintiff's termination.

38. The obstructions of justice alleged in the Complaint all occurred subsequent to the termination and did not cause it.

39. Count 6 of the Complaint is barred by the statute of limitations applicable to common law conspiracy actions, 42 Pa. C.S.A. § 5524.

40. Plaintiff's common law conspiracy action accrued, if at all, more than two years prior to the filing of its 1981 Complaint and, therefore, is barred by the applicable statute of limitations.

41. The statute of limitations on common law conspiracy actions runs from the last act allegedly committed as part of a common law conspiracy which causes injury to plaintiff.

42. The last act committed as part of an alleged common law conspiracy which caused legally actionable injury to plaintiff was the termination of plaintiff's General Agency contract in February, 1978.

43. Because summary judgment against the federal law claims in this Complaint should be granted, no basis

exists for the continued assertion of pendent jurisdiction. Count 6 should be dismissed.

44. There is no genuine issue of material fact and the Agency defendants are entitled to judgment as a matter of law on Count 6 of plaintiff's Complaint.

IV. Plaintiff's Claims Against Diane Pariano

45. All six counts of plaintiff's Complaint assert claims against Diane Pariano.

46. Diane Pariano was not named as a defendant in plaintiff's 1978 suit and is named only once in plaintiff's 1981 Complaint.

47. Diane Pariano did no participate in any way in any actions which led to the termination of plaintiff's General Agency Contract. (Pariano Affidavit attached hereto).

48. As of the date of plaintiff's termination in February, 1978, Diane Pariano was a 19 or 20 year old secretary in a one-secretary office operated in Cleveland by Agency Holding Corporation (Ohio). She had held that position for approximately six months. Prior to that she attended college for two years, and was not associated with Agency Holding Corporation (Ohio) in any way. As of February, 1978 she was not associated with Agency Holding Corporation (Illinois) or Ehrman Ratini Oglevee & Craig in any way.

49. No causal link exists between any act or agreement of Diane Pariano and legally actionable injury alleged by plaintiff.

50. The only injury alleged in the Complaint to have been caused by the wrongful activity of the defendants for

which the law provides a remedy was the termination of plaintiff's General Agency Agreement in February, 1978.

51. The law does not provide a remedy or recognize as injuries, the "lawsuit injuries" alleged in the Complaint—"expenses, delays and inconvenience ... imposed ... in [the] prosecution of [plaintiff's pending 1978 suit and denial of] Relevant and material evidence ... in [the pending 1978 suit]."

52. There are no genuine issues of material fact and Diane Pariano is entitled to judgment as a matter of law on Counts 1 through 6 of plaintiff's Complaint.

Dated: July 29, 1982

THORP, REED & ARMSTRONG

/s/ JOHN H. BINGLER, JR.
John H. Bingler, Jr.

/s/ GLENN E. BOST, II
Glenn E. Bost, II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
a corporation,
Plaintiff,

vs.

CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

ATTACHMENTS TO
MOTION FOR SUMMARY JUDGEMENT

Affidavit of Kerry Patrick Craig ..... A

Affidavit of Robert C. Oglevee ..... B

Affidavit of Diane Pariano Craig C

Transcript before the Honorable
John D. Flaherty, Jr. J.
(Court of Common Pleas of
Allegheny County—February 15 and 16, 1978) .... D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
a corporation,
Plaintiff,
vs.
CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

AFFIDAVIT IN
SUPPORT OF
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

STATE OF ILLINOIS
COUNTY OF COOK } ss:

Kerry Patrick Craig, having been sworn says:

1. I am the President and sole shareholder of Agency Holding Company (Illinois), the General Agency for Crown Life Insurance Company ("Crown") for the State of Illinois. I have been President of Agency Holding Company (Illinios) since September, 1977. Prior to becoming President of Agency Holding Company (Illinois), I was an employee in the home office of Crown Life Insurance Company ("Crown") in Toronto. My immediate supervisor at Crown was Art Thomas, an Agency Vice President, responsible for certain of the General Agencies in the United States including the Pittsburgh General Agency of Malley-Duff & Associates, Inc. ("Malley-Duff"). Mr. Thomas' immediate supervisor was Clarke Lloyd, the Senior Agency Vice President of Crown for the United

States. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion for Summary Judgment.

2. In 1977, I was employed as an Agency Supervisor in Crown's Agency Department. In this capacity, I had occasion to periodically visit the Malley-Duff General Agency in Pittsburgh. In early August 1977, Clarke Lloyd and I met with Thomas Malley and James Duff, the owners of Malley-Duff in Pittsburgh in early August, 1977 concerning the inadequate sales production performance of Malley-Duff and the imposition on Malley-Duff of a sales production standard for 1977. I also became familiar with the reasons for the imposition of the standard and the manner in which it was imposed. It was discussed with Messrs. Malley and Duff at the August 1977 meeting in Pittsburgh and was officially communicated to them by letter from Clarke Lloyd dated August 19, 1977. A copy is attached as "Exhibit A". The production standard called for a sales level of $7.5 million "Ordinary Net Paid". The Malley-Duff sales production had not been satisfactory for a number of years. Messrs. Malley and Duff had been told many times about this. The imposition of a production standard was a last resort. The August 1977 meeting was prompted by the January-June sales production figures of Malley-Duff which showed that Malley-Duff's performance was continuing to be unsatisfactory.

3. The production standard imposed on Malley-Duff for the year 1977 was lower than the production achieved by Malley-Duff in the years 1970, 1971, 1972 and 1975.

4. Crown had been setting sales production standards for many years for General Agencies who were not doing an adequate job in Crown's view. This gave the General Agencies and Crown a standard of performance Crown

would find acceptable. A General Agency would be told it needed to achieve a certain amount of sales production or Crown would have to find someone else to handle the market. The standard is set at a certain percentage of the total market in the General Agency's geographic area.

5. On October 4, 1977, Clarke Lloyd again wrote to Messrs. Malley and Duff and urged them "to put forth every effort to avoid termination of [their] contract for lack of production at the beginning of 1978." This letter was prompted by a review of Malley-Duff's sales production figures for January-September, 1977 which showed that Malley-Duff wasn't doing anything in the marketplace.

6. Malley-Duff operated as General Agency of Crown under General Agency Agreements amended and entered into periodically as products or commission rates were changed. Paragraph 30 of these Agreements provided:

> This Agreement may be terminated on one month's notice by either party and such notice will be deemed to have been given when a registered letter containing the notice is mailed addressed to the party entitled to the notice at the party's last known address.

7. When Malley-Duff failed to meet the production standard set forth in the August 19, 1977 letter, Crown exercised its right under paragraph 30 and terminated Malley-Duff on one month's notice by letter dated January 11, 1978 effective February 10, 1978. A copy of this letter is attached as "Exhibit B". Malley-Duff produced in 1977 approximately $5.5 million in "Ordinary Net Paid".

8. Even after termination, Malley-Duff was entitled under its Agreement with Crown to receive vested renewal commissions on premiums paid on policies solicited by Malley-Duff prior to termination. Since termination, the

renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

9. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ KERRY PATRICK CRAIG
Kerry Patrick Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ ARTHUR R. O'BRIEN
Notary Public

My Commission Expires:
October 28, 1984

D-19

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
Plaintiff,
vs.
CROWN LIFE
INSURANCE COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

AFFIDAVIT IN
SUPPORT OF
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

STATE OF ILLINOIS
COUNTY OF COOK } ss:

Diane Pariano Craig, having been sworn, says:

1. I am presently Mrs. Kerry Patrick Craig. Kerry and I were married on April 16, 1982. From July 13, 1977, to June 30, 1978, I was employed as a secretary in the one secretary office of Agency Holding Corporation (Ohio) in Cleveland. I was at the time 19 and 20 years old. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion For Summary Judgment.

2. After I graduated from Fairview Park High School in Fairview Park, Ohio, a suburb of Cleveland, in 1975, I attended college for two years until May 1977. During this period, I was not associated with Agency Holding Corporation (Ohio) in any way.

3. In June 1977, I began looking for a job and on July 13, 1977, was hired by Edward J. Horning to work as the secretary for Agency Holding Corporation.

4. On February 13, 1978, in Pittsburgh I learned for the first time that Malley-Duff & Associates, Inc. ("Malley-Duff") had been terminated as General Agent in Pittsburgh. I had never heard of Malley-Duff prior to that date. Robert Oglevee, my boss at Agency Holding Corporation (Ohio), asked me to help Crown organize the Malley-Duff records which had been turned over to Crown in Pittsburgh at or shortly after the termination.

5. I did not participate in any way in any acts, agreements, discussions or anything else that had to do with the setting of a production standard for Malley-Duff or the decision to terminate or the termination of Malley-Duff.

6. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ DIANE PARIANO CRAIG
Diane Pariano Craig

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ ARTHUR R. O'BRIEN
Notary Public

My Commission Expires: October 25, 1984

D-21

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MALLEY-DUFF &
ASSOCIATES, INC.,
Plaintiff,
vs.
CROWN LIFE
INSURANCE
COMPANY,
a corporation, et al.,
Defendants.

Civil Action
No. 81-439

AFFIDAVIT IN
SUPPORT OF
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

STATE OF ILLINOIS
COUNTY OF COOK } ss:

Robert C. Oglevee, having been sworn, says:

1. I am the President and sole shareholder of R. C. Oglevee & Assoc., Inc., the General Agency for Crown Life Insurance Company ("Crown") for the Pittsburgh area. I have been President of R. C. Oglevee & Assoc., Inc. or Secretary of its predecessor Ehrman, Ratini, Oglevee & Craig, Inc. since 1978. I am familiar with the facts set forth in this affidavit, which I make in support of Defendants' Motion for Summary Judgment.

2. Even after the termination of its General Agency Agreement, Malley-Duff was entitled under its Agreement to receive vested renewal commissions on premiums paid on policies solicited through Malley-Duff prior to termination. Since termination, the renewal commissions to which Malley-Duff is entitled have been paid to Malley-Duff. None have been transferred from Malley-Duff to any defendant.

3. I did not participate in any way in any acts, agreements, discussions, conspiracy, or anything else that had to do with conspiring to deter or deterring, by intimidation or threat, Plaintiff or witnesses in Plaintiff's 1978 suit from prosecuting that action or from testifying therein.

/s/ ROBERT C. OGLEVEE
Robert C. Oglevee

Sworn to and subscribed
before me this 21st day
of July, 1982.

/s/ MARY CAIVANO
Notary Public

My Commission Expires:

D-23

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

MALLEY-DUFF &
ASSOCIATES, INC.,
a corporation,
Plaintiff,
vs.
CROWN LIFE
INSURANCE COMPANY,
a corporation,
JULES EHRMAN, et al.,
Defendants.

G.D. 78-3321

, Pittsburgh, Pennsylvania
February 15 and 16, 1978

BEFORE: The Honorable John P. Flaherty, Jr., J.

APPEARANCES:

For Malley-Duff & Associates, Inc.:
H. WOODRUFF TURNER, ESQUIRE
MISS JANICE H. ANDERSON
Kirkpatrick, Lockhart, Johnson & Hutchison
1500 Oliver Building
Pittsburgh, Pa. 15222

For Crown Life Insurance Company:
ALEXANDER BLACK, ESQUIRE
Buchanan, Ingersoll, Rodewald, Kyle & Buerger
57th Floor, U.S. Steel Building

For Jules Ehrman: GERALD S. LESHER, ESQUIRE
HERBERT B. SACHS, ESQUIRE
Baskin, Boreman, Wilner, Sachs, Gondelman & Craig
Tenth Floor, Frick Building

TRANSCRIPT OF OFFICIAL STENOGRAPHIC NOTES OF PROCEEDINGS

Ralph E. Shuster,
Court Reporter
331 Grant Building, Pgh., Pa. 15219
Cover page rec'd from J. Borus (Budem) on 6/8/79 by G. Bost

PLAINTIFF'S WITNESSES:

	DIRECT	CROSS	REDIRECT	RECROSS
MR. KERRY PATRICK CRAIG	5	57		
MR. JULES EHRMAN	59			
MR. CLARKE BURTON LLOYD	71	122	127, 131	129
MR. JAMES A. DUFF, JR.	134	144		

Plaintiff's Preliminary Injunction Exhibits	Identified	Received
No. 1—	12	13
No. 2—	75	107
No. 3—	83	85
No. 4—	107	
No. 5—	116	
No. 6—	144	143
Crown's Preliminary Injunction Exhibit No. A	142	132

(Author's Copy Missing)

created, that my clients have created. In other words, is he going to come in now and take over, either directly or indirectly, the business that my clients built up in Pittsburgh?

THE COURT: Is that the offer?

MR. TURNER: Essentially, Your Honor.

MR. LESHER: I would say, Your Honor, that the offer is irrelevant and immaterial.

THE COURT: It might well be. But we will hear the testimony. And the Court will then decide. I reserve any ruling on the merits of that point.

(AFTER SIDE BAR CONFERENCE)

MR. KERRY PATRICK CRAIG, called as a witness in behalf of the Plaintiff, first duly having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TURNER:

Q State your full name, please.

A Kerry Patrick Craig.

Q And what is your address?

A 1421 North Dearborn, Chicago, Illinois.

Q Of what country are you a citizen?

A Canada.

Q Where are you employed?

A Presently?

Q Yes, sir.

A I am self-employed, but I am employed by Agency Holding Corporation of Chicago.

Q In what capacity are you employed by Agency Holding Company?

A I am President of Agency Holding Corporation.

Q Are you?

A It's a corporation, by the way, not a company.

Q Agency Holding Corporation?

A Corporation.

Q Where is that company incorporated?

A Chicago, Illinois.

Q What is the nature of its business?

A It's a general agency for the Crown Life Insurance Company.

Now, are you one of the shareholders or owners of that company?

A I am.

Q In your capacity or as a nominee for someone else?

A My own capacity.

Q How long have you been so employed?

A I have been employed since I received my papers. I moved down here in September, September 2nd of this year.

Q You mean, down here last year?

A My immigration papers.

Q Your immigration papers. And when was that, sir?

A September of this year.

Q September of last year, do you mean?

A Excuse me. Yes.

Q September of 1977?

A Yes, correct.

Q And what is the—in general, tell His Honor what the business of this Agency Holding Company is.

A It's a general agent for the Crown Life Insurance Company. And that is, that we solicit insurance from independent brokers to place with the Crown Life Insurance Company.

Q And in what geographical territory does your company carry on its business.

A It is, except for a couple of counties that I am not sure of right now, the entire State of Illinois.

Q Now, are you in any way connected with a company that holds a general agency for the sale of Crown insurance in the State of Ohio?

A Yes, I am.

Q And in what capacity?

A I am a Vice President of that company, domiciled in Cleveland.

Q In Cleveland. And are you connected with that Cleveland Agency in an ownership capacity?

A Yes, I am.

Q How long have you been so affiliated?

A Approximately the same time.

Q Now, are you connected with the Crown general agency, any entity holding a Crown agency in any other city, other than Cleveland and Chicago?

A No, I am not.

Q What is your age?

A I am thirty years old.

Q Prior to being employed by this agency holding company, where were you employed?

A I was employed in the Home Office of the Crown Life Insurance Company in Toronto.

Q In what capacity?

A I was in the Agency Department. I was Agency Supervisor.

Q How long were you so employed?

A By the Crown Life Insurance Company?

Q Yes, sir.

A Almost nine years.

Q And in the same capacity during that nine years?

A No, no.

Q Was that your position when you left the employ of Crown Life Insurance Company?

A Yes.

Q Now, in your capacity as a Supervisor in the Agency Department at Crown, to whom did you report?

A Mr. Art Thomas. He is an Agency Vice President.

Q Was he in charge of agencies in the United States or—

A Part of the agencies in the United States.

Q Now, in your dealings as an employee of the Home Office, did you have any connection with an agency in the City of Pittsburgh known as the Malley-Duff & Associates, Inc.?

A I had some connection; not much.

Q Your answer is Yes?

A Yes. Some.

Q Now, did you have any dealings with that Agency in the summer of 1977; specifically, in early August?

A What do you mean by dealings?

Q Did you have any business transactions with them? Did you speak to them? Did you talk with them? Did you meet with them?

A There may have been a memo that came across my desk that they wanted something from the Advertising Department. Is that what you are talking about?

Q You don't know whether you had any dealings with them or not? Is that it?

A No. I had fifty-some agencies that I worked with. Stuff crossed my desk all the time. If you have something specific,—

Q Very well. Did you, late in July or early in August, 1977, come to the City of Pittsburgh to meet with the principals of the Malley-Duff Agency?

A Yes, I did.

Q Do you know the date of that meeting?

A Offhand, no, I don't.

Q And at that meeting, were you aware of any discussions that took place concerning a quota of production that was to be imposed upon Malley-Duff & Associates?

A Yes.

Q And prior to coming to that meeting, had you spoken with anyone else at Crown concerning the imposition of this so-called quota on Malley-Duff?

A Yes.

Q And with whom had you spoken concerning that subject?

A I think the, initially, Art Thomas; then Clarke Lloyd. See—

Q Who was Clarke Lloyd?

A Clarke Lloyd is a Senior Agency Vice President for the United States that Mr. Thomas reports to.

Q Is this Mr. Lloyd in the courtroom today?

A Yes, sir.

Q Did Mr. Lloyd, in fact, accompany you to the City of Pittsburgh to meet with Messrs. Duff and Malley?

A Yes, sir.

Q Following the meeting in Pittsburgh, did you and/or Mr. Lloyd write a letter in which certain quotas for the year, 1977, were imposed upon Malley-Duff & Associates?

A Yes. I believe the letter was sent to them.

Q Did you send it?

A I didn't write it, no.

Q But you are aware that a quota was imposed, are you not?

A Yes, I am.

Q Now, at the time,—do you know what time period that quota covered?

A The time period, I think, it was until the end of that year.

Q From what starting point?

A From the beginning of that year, I believe. I didn't write the letter. I am not much familiar with it. Being not an officer of the Department, I am not in a position to impose quotas on agencies.

Q But you participated in this decision to impose the quota?

A I was in on the discussion, yes.

Q Well, did you agree with the decision or did you oppose it?

A I agreed with it.

Q Yes, sir. Now, when did you actually—Strike that, please. As I understand it, then, sir, in August of 1977, Crown Life imposed a quota on Malley-Duff covering the period from January 1, 1977, until December 31, 1977; is that correct?

MR. BLACK: Just a minute. Your Honor, I think this is improper because this letter is a written document. Mr. Turner has it and has had, I think, for quite a while. He has attached it as Exhibit B to the Complaint. And I don't think it is fair for him to be cross-examining this witness, who didn't make the decision, about what the letter said.

THE COURT: I see the letter being produced at this time.

MR. BLACK: It's Exhibit B to the Complaint.

MR. TURNER: I will withdraw the question and ask that this be marked for identification and we can proceed from there.

MR. BLACK: Actually, Mr. Turner's questions, I think, misstated what the letter said, because—

THE COURT: The letter will speak for itself.

MR. BLACK: I think it should.

MR. TURNER: I will withdraw the question. We will mark that as Preliminary Injunction Exhibit 1, let's say, and admit it into evidence.

THE COURT: The Exhibit will be that which is attached to the complaint and that is the one to which the Court will refer, if necessary.

(Plaintiff's Preliminary Injunction Exhibit No. 1 was marked for identification.)

MR. TURNER: This has been marked Exhibit 1 for this hearing.

BY MR. TURNER (continuing):

Q Let me put this before you, Mr. Craig, and ask you if you have ever seen that document before.

A Yes, I have.

Q Isn't, in fact, that Exhibit 1 the letter to which we have been referring here and talking about, the imposition of a quota?

A Yes.

Q And it is dated August 19th, 1977? Is that the date of the letter, sir?

A Yes, it is.

Q And as a matter of fact, on Page 2, the quota that Crown imposed was a quota for the period, January 1, 1977, through December 31, 1977; and then on for future years; right?

MR. BLACK: That is objected to, Your Honor. The letter speaks for itself.

THE COURT: All right, I will sustain the objection. We don't require testimony, I believe,—

MR. BLACK: May I—

THE COURT:—relating to the letter because we have it here.

MR. TURNER: Very well.

THE COURT: And it's admitted into evidence. We can have argument from the letter at a later time.

MR. TURNER: Very well. I will withdraw the question, Your Honor. No problem.

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dispute over it—I didn't know that there was a serious question as to authenticity of this letter.

MR. BLACK: I don't know whether there is, either, Your Honor. This original document must have been in the hands of Mr. Turner's clients. I have

had no opportunity to compare it with what Mr. Turner has just given me.

THE COURT: I don't know the significance of the letter, either, yet. I just know of—well—Do you object to the admission of this letter into evidence for this proceeding? As you are aware, we are here on a preliminary injunction matter.

MR. BLACK: If I am provided with an opportunity to compare this, what has been marked as Exhibit 1, with the original, I'll not raise any question about this not being the original. But I haven't had that opportunity.

THE COURT: Well, I am certain that counsel will permit you that opportunity. Please let us move on.

MR. TURNER: Yes. Well, let me ask this witness, Your Honor, since the question has been raised.

BY MR. TURNER (continuing):

Q You saw the original letter that was sent out, did you not, to Messrs. Malley and Duff?

A I am not sure whether I did or not.

Q Your testimony is, you don't know whether that is the letter that was sent or not?

A It looks like it. It's familiar to me. I am not an expert, if that is what you are asking.

Q Did the letter that you saw say that Malley-Duff shall have an ordinary net paid level at December, 1977, of seven and a half million dollars? Is that what the letter you saw said?

A Yes, I would say Yes.

Q Sure. Now, did you appreciate, sir, when you were participating in the writing or the agreement to send out this letter, that the year to which—

A It was a very brief—

Q Would you let me finish, please.

MR. BLACK: Don't interrupt the witness. If Your Honor, please, I think the witness should be allowed to explain his answer.

THE COURT: I think there was a little confusion there. I don't believe counsel has finished the question. Maybe the witness thought he had. Why don't we start—

A I didn't participate in the authorship of the letter, if that is what you are implying.

Q No. I am asking you, sir, whether you at the time you were engaged in the consideration of this matter on behalf of Crown, were aware that the year which the quota was covering was approximately eight and a half twelfths expired; did you know that?

A Well, I know that were August falls in the year, yes.

Q Do you know of any other written document that was sent to Messrs. Malley and Duff before August that imposed a quota upon them for the year 1977?

MR. BLACK: Now, Your Honor, Mr. Turner keeps speaking in terms of a quota; but I don't see that anywhere in this letter. I think he ought to use a less inflammatory word. The letter speaks of meeting standards. I suggest we call it a standard.

THE COURT: We know what we are talking about. I believe the question, Mr. Black, was, was he aware of any standards, as you put it, which exist independently of the letter; isn't that correct?

MR. TURNER: At a prior time.

THE COURT: At a prior time, you see. And so, if he does, by his own personal knowledge, he would so answer. And if he doesn't, then, of course, he will so advise. Mr. Witness?

A No, I am not aware of any, any written—there may have been verbal. I am not—

Q All right, now, at the time this letter was sent to Malley-Duff & Associates, did you know how much business they had produced up to, at or about that middle of August, when the quota was imposed?

A I would have known. It was my job to know.

Q Do you recollect and—

A No, I don't have a recollection. As I said, I had fifty agencies.

Q Was it seven and a half million dollars?

A As I said, I don't know. You asked me.

Q Do you know whether Malley-Duff had ever, out of their Pittsburgh operation, alone, sold seven and a half million dollars?

A I think they did. They may have. Again, you are asking me; and I am saying it off the top of my head.

Q If you don't know, tell me.

A I think they may have at one point. They may have exceeded that. I am not too sure. You are asking me things I am not completely familiar with right now.

Q Subsequent to the quota, subsequent to the writing of Exhibit 1, for this hearing, were you aware of any other correspondence or communications addressed to Malley-Duff with respect to this so-called quota or goal or whatever Mr. Black prefers?

A No.

Q After you were in the City of Pittsburgh in early August of '77, preceding the writing of Exhibit No. 1, did you thereafter, up to the present day, have any conversations concern

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he and Mr. Craig are discharged.

THE COURT: If there are no further questions, then I would excuse the witness.

MR. LESHER: Is he discharged from the obligation of the subpoena?

MR. TURNER: Yes. I appreciate counsel's courtesy and I have no objection to excusing them.

THE COURT: The witness may stand down.

MR. TURNER: Mr. Lloyd.

MR. CLARKE BURTON LLOYD, called as a witness in behalf of the Plaintiff, first duly having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TURNER:

Q Will you state your full name, please.

A Clarke Burton Lloyd.

Q What is your address or residence?

A 19 Heathdale Road, Toronto, Canada.

Q What is your country of citizenship?

A Canada.

Q What is your occupation?

A I am the Senior Agency Vice President for the United States for the Crown Life Insurance Company of Toronto, Canada.

Q How long have you held that position?

A A few years, perhaps five.

Q How long have you been employed by Crown Life Insurance Company?

A Since 1947.

Q Have you ever heard of an entity, Agency Holding Company of Illinois?

A Yes, I have.

Q Do you know who the owners of that company are?

A Yes, I do.

Q Who are they?

A Kerry P. Craig.

Q Is he the sole and only owner, so far as you know?

A So far as I know, he is the sole and only owner.

Q And what is the business of that company?

A They are the general agents for the Crown Life Insurance Company for the State of Illinois.

Q How long have they been so engaged?

A Since March of 1977.

Q I believe the witness, Craig, testified yesterday that he was not capable to enter the country to start this work until September. Was it run by others in the interim?

A Yes, it was.

Q By whom?

A It was run by a lawyer in the—a Mr. Bruce M. Pennamped, who maintained the agency for the Crown Life due to the death of the general agent who had been there previously. And the company required an entity to be set up so that the family's interest could be maintained.

Q And did Crown acquire or did Agency Holding acquire the family's interest?

A No, they did not.

Q All right, this gentleman was operating the business in the capacity of running this agency rather than as a counsel to the agency?

A No, he ran it as a counsel to the agency.

Q But he actually managed the business affairs during this interim; is that right?

A Any business affairs that required to be managed, he managed, although, in fact, the accountant for the previous general agency really ran the affairs of the

agency from a record basis and a former broker, who was a friend of the family of the deceased, managed it from a sales point of view. Mr. Pennamped really managed it from a legal overview point of view, somebody who would sign the necessary legal papers that have to be maintained, et cetera.

Q All right, now, what is your role in Agency Holding, Inc., of Illinois?

A My role in Agency Holding?

Q Yes, sir.

A I don't understand the implication of the question.

Q Do you have any role as a manager of decision maker, policy maker, of that agency?

A No, not whatsoever, other than the normal role that would be maintained with every agency, which is one of looking after the Company's interests.

Q That's right. Now, did you at any time in the past have a position of authority and decision making within the structure of Agency Holding?

A No, I didn't, never did, at no time.

Q What about this Agency Holding of Ohio that we have heard about? Did you have any role in that Company?

A No, sir, none whatsoever.

Q Does Crown Life Insurance have any, as a corporation, have any interest in Agency Holding?

A No, sir. It has no interest in any agency.

Q Has Crown Life Insurance provided the financing of this Agency Holding?

A As it does with any agency, no more and no less.

Q Has it provided employees from the Home Office to go out and work on the affairs of Agency Holding?

A To the extent that the Crown Life has a training program, we have two young men working in that agency, being trained for other positions. These young men have worked in our agencies, in Hawaii, in Hartford, in Dallas—they are available to be moved around to all agencies whenever we have

(author's copy missing)

A I don't remember saying that.

Q But you remember saying what?

A I remember saying, when we had just made an arrangement where we were going to give extra compensation on old business, I was discussing it with a group of general agents. Malley came in the room and said it wasn't—then he used some short, vituperative terms, indicating that he wasn't satisfied with the arrangement in any way and that my views were inciting the group to create havoc. And I said, if he wanted to terminate, that was his choice, or something like that. I don't—I have never said that, if somebody doesn't get that S.O.B. out of the room,—I have never said that to anybody. Nor, might I add, have I ever left the room when somebody asked to get me out of the room.

Q Did you come to Pittsburgh in early August, last, to meet with Mr. Malley and Mr. Duff?

A I did.

Q Who was with you?

A Mr. Craig.

Q Did you discuss at that time the imposition of a quota?

A Yes, I did.

Q And did you inform the Malley-Duff agency as to what their quota for 1977 would be?

A Yes, I did.

Q What did you tell them?

A Seven million, five hundred thousand dollars, if notified, in individual business, individual life and individual health.

Q Did you put that in writing?

A I did, yes.

Q And for what period of time? What period of time did they have to meet that quota, sir?

A Well, they had that entire year. it was on that year's business.

Q And when did that entire year end?

A December 31st. December 10th.

Q December 10th?

A I believe so, December 10th, or 11th.

Q December 10th. Do you know what day in August you imposed this quota?

A No, I don't. Maybe about the middle of August.

Q And the period, then, would have started the prior December 11th, or 10th; is that right?

A That's correct.

Q And would run through, until—

A That's correct.

Q —December 10th, 1977? At the time you imposed that quota, were you aware of the volume of sales that had been recorded prior to mid-August when you imposed the quota?

A I had been aware of the volume of sales in that agency for a number of years. They certainly weren't satisfactory, and we had told them many times about it.

MR. TURNER: Your Honor, I would ask that the witness answer the questions.

MR. BLACK: That is an answer.

MR. TURNER: It's not an answer.

THE COURT: I'll let the testimony stand.

A The volume of sales; I don't remember specifically the volume of sales. They were terrible.

Q Well, what were they? A million?

A Maybe two and a half million.

Q All right. Now, were they two and a half million?

A I don't know.

Q Approximately what you would recall?

A I would think they would be about two and a half, three million. I don't recall. It would be very low.

Q And the quota that you imposed, then, required them, from August, from mid-August, to mid-September, mid-October, and mid-November, mid-December, in

five months, they were to sell two and a half times what they had sold in the first eight months of that year, eight, nine months of that year; is that right?

A Well, I wouldn't know—Candidly, at that time, I would only have the June figures; so the figures I am quoting would be the six-month figures.

Q Yes.

A The answer to your question is, I would expect that, and more.

Q Do you know the date upon which you first gave them a number, that is to say, the quota, itself?

A I would say in August, verbally. Maybe before that. I don't know. We have been setting levels of business for many general agents, who are in our view not doing a job for us. This gives them and us a standard of performance that we would find acceptable.

Q Did you give any other general agents quotas in August?

A Well, no. I wouldn't do it in August. You know, I could have done it in September, to one or two.

Q You did some in September to one or two?

A Sure.

Q Who?

A I think Minneapolis, we set one up in September. I think others, you know. These are achievements that—levels, that we would say to somebody, "You know, you are not doing it, and you need to do this much by the end of the year, or we are going to have to find someone else to handle the market."

Q You did it in Minneapolis in September?

A Oh, no. I didn't do it, no. I shouldn't say I did it. One of my associates. When I say I, I am saying the corporate I.

Q Did they make that quota?

A Yes, sir. The only agencies that didn't was Malley and Duff, this year. Mind you, there are other, as you, if you read the letter, you know that this is a scaled up thing over a number of years, so they will have to reach a level, depending on the market place. We do it by percentage of market.

Q What other agencies who had a quota imposed upon them in September, or August, November, October, for a year, ended December 10th, had a quota imposed that was two or three times the business that they had written at the time that the quota was imposed?

A I don't know.

Q You knew, when you imposed that quota that they weren't going to make it, didn't you?

A I did not know they weren't going to make it. As a matter of fact, they both told me there would be no difficulty in making it.

Q When did they tell you that?

A In August, at the meeting. In fact, Mr. Malley said, "I can't work with quotas. I don't like quotas. I can't work well with a quota." The implication was, if I didn't give him a quota, he would do much better than that. This agency should have been doing much more volume.

Q I haven't asked you a question, sir. Now, did you ever have any discussions with anyone whatsoever to the effect that Malley-Duff would not make that quota, at or about the time you imposed it?

A No. I don't think so. I don't know. I could have. I couldn't have. that's—

Q Well, now, this is a very important matter to my clients. Did you tell people, tell anyone at the time that they weren't going to make this quota?

A I may have.

Q Did you tell Mr. Oglevee that they weren't going to make their quota?

A I doubt it. I may have.

Q Who was it that you told?

A I would have told Art Thomas, who was an associate. I would have told other people in my office, Operations.

Q Mr. Craig?

A I might have told Mr. Craig.

Q He was there when you imposed the quota; right?

A Yes. But I didn't say that I made that statement then. Did you say at that meeting, did I make that statement?

Q No, no, no. I am saying, at or about the time of that meeting, I want to know who it was you told—

A I would have said, in context, with the attitude of those two fellows, they will never make that quota. And I think I have said that to others.

Q So then, at the time you believed they wouldn't make the quota?

A Because of the attitude they took.

Q Sure.

A That doesn't imply that they could not have made that quota. If they went out and worked.

Q I know. But you didn't think they could make the quota?

MR. BLACK: He is misstating the witness' testimony.

BY MR. TURNER (continuing):

Q You didn't think they would make the quota in time?

MR. BLACK: I am objecting to his misstating the witness' testimony.

THE COURT: Well, I am not concerned with his misstatements. I am listening to the testimony of the witness.

MR. TURNER: If so, I apologize.

THE COURT: O.K. I am looking, once again, at the time. It is now twenty-five minutes to 11:00. And there is another case that is here that you well know, that we had scheduled for today, and with witnesses from out of town, and one very seriously ill, as I understand it. How much longer do you anticipate the testimony to go in this case? We might have to recess, least to go until 12:00 Noon. Now, proceed.

BY MR. TURNER (continuing):

Q I show you what has been marked here as Exhibit No. 1, for this hearing. And I ask you if you can identify that document.

A That looks like very much, yes, it's the letter I wrote to Malley-Duff & Associates.

BY MR. BLACK:

Q Is that the original letter?

A No. It's a copy.

Q Or is that a Xerox copy?

A No. it's a Xerox.

MR. BLACK: You promised to let me see the original. I just wonder if you have had time to locate it?

MR. TURNER: I have not located it. I will endeavor to find it, Mr. Black; but my files contain only the photographic copies.

A I think that is the one, yes.

Q You can examine it, sir. It's your letter. That contains a quota on the second page of that Exhibit 1, does it not?

A Well, we referred to it as a standard that seems to be an issue, but that's the one, yes, sir.

MR. TURNER: At this time, Your Honor, I would (author's copy missing)

(Plaintiff's Preliminary Injunction Exhibit No. 4 was marked for identification.)

BY MR. TURNER (continuing):

Q I show you, sir, what has been marked as Exhibit 4 for this hearing, and ask you if you can identify that document.

A That's a letter that I wrote to Malley and Duff.

Q You signed it?

A I did.

Q And this is a photocopy, is it not?

A Yes, sir.

Q But it is, so far as you know, a true photocopy?

A I would say so, yes.

Q And what, sir, did you mean, when you say, "I strongly urge you to put forth every effort to avoid termination of your contract"? Why did you write them such a letter in October of 1977?

A To encourage them to, to get out and do some work. You didn't quote the entire sentence, Counselor. May I quote the entire sentence?

THE COURT: Yes, you have that right.

A "I strongly urge you to put forth every effort to avoid termination of your contract for the lack of production at the beginning of 1978."

Q So you wrote in Exhibit 3, imposing the quotas on August 19th?

A Right.

Q And on September 4, or October 4, you write and say, "You are not doing very well; you are going to be terminated." Is that what you were telling them?

Unless they produced an amazing amount in the last month or two?

A Yes. In essence, Counselor, in response to that letter, the response to that question, that we had been doing everything we possibly could to encourage, for a number of years, these two fellows to start working together. As you know, there was conflict between them in the agency and because of this conflict, they were not out on the street, developing business. We tried to encourage them to do that. There were points of time where Mr. Malley tried to buy out Mr. Duff, and Mr. Duff was trying to buy out Mr. Malley. This has been going on for a number of years. My point is, that the Company's affairs, the Company's production, the Company's business that they were involved in was beginning to fail and when I say the Company was paying a price for their internecine activities. And the point of this letter is, "You haven't done anything since I told you to get off the stick. And here it is in October, and you are no farther ahead than you were in July. So I strongly urge you to do everything in your power to get business."

Q O.K. Isn't it a fact that the figures you were talking about here were the September 15th figures?

A That would be correct, yes.

Q And isn't it true that the September 15th figures were figures that came out less than a month after you had imposed this quota?

A Yes. But I used figures of June, as I testified earlier.

Q But the tone of your letter, Exhibit 4, here, is based upon events that had transpired in less than one month, after you had imposed the quota.

A Well, it could well be. This—I don't understand the point.

Q Let me rephrase it. The basis of your letter of October 4th, were the September 15 production figures.

A Correct.

Q And the interval between the imposition of the quota and the September 15th production summaries was some three weeks, was it not?

A Yes.

Q Now, did you have any knowledge of the particular amount of sales that had been promulgated during that three-week period, after you had imposed the quota?

A Yes.

Q How much were they?

A Well, I don't know; but we get dailies—I get a daily report on how much business is being produced by agencies. Mr. Malley indicated in conversation that one of the agencies, one of the brokers, was going to produce eight or nine million dollars of business. That was—or thirty million dollars. I talk about a thirty million dollar case or eight or nine million dollars worth of business. And obviously, we wanted them to get that business.

Q Sure. And he had three weeks, here, before your October 4th notice, to get organized and go out and start

selling, is that right, before these September 15th figures came out?

A The September figures were terrible. And there was—obviously, if they didn't get going quickly, they were going to—they weren't going to be able—they weren't doing anything in the market place. I don't understand what significance this is. All I am doing is pointing out what the current figures are, the last possible figures after my visit and indicating to them, they are still a long way off target and telling them they had four or five months to go.

Q Had you anticipated, within a three-week period after you imposed the quota, that the skys would rain business onto this agency?

A From the impression I got from Mr. Malley, yes.

Q And it's your experience, as an experienced insurance man, that when someone is given a quota, within a space of three weeks, they are going to have a lot of new business?

A Yes, sir, it is my experience.

Q Now, after your letter of October 4th, did you communicate with the agency further, in the year, 1977, concerning this quota?

A Yes, sir.

Q In what respect?

A Well, in one instance, particular, Tom and Jim came to the Home office with this same broker that was going to give them, that they expected this business from. And, naturally, we wanted to save the agency, if we could, and the point was made, is this business

coming in? And apparently we didn't know. And Jim said to me, "Well, are you going to cancel us at the end of the year?" And I said, "Well, I won't be able to tell you until January 10th, because we won't have all the figures in until then. That will give you time to get all the business that you can possibly get in." As a matter of fact, the business, as you know, from the figures, I think that you have been supplied, it has been going downhill fairly drastically, and this year wasn't much better. Mr. Ehrman did more business on an individual basis than Malley and Duff had done on the brokerage basis. The agency just was not performing.

Q Well, how much did they perform? How many dollars did they sell for you last year?

A I have the figures here, so I will quote.

Q Well, do you know?

A Well, I know from the figures here, this year, they ended up with a net paid of about $5,518,155.

Q May I see what you are referring to, sir. And that amount, I take it, according to your figures, here, that exceeds the amount that they sold for you in 1976?

A By about $1,300,000; but it's way below 1975, '74; the same as '73; way below '72, '71, and '70, and about the same as they were producing in '69.

Q How much did Mr. Ehrman's agency sell last year?

A Slightly more than that, about $5,600,000.

Q I see. Did you terminate him?

A No, sir.

Q Did you impose a quota on him for only selling five and a half million?

A No, sir. He is a personal producer, as he carefully explained to you.

Q Yes. Did you have any other agents—how many agents do you have in the United States of America.

A About eight, 87.

Q Any of them produce less than five and a half million dollars for you last year?

A Some. Newer ones.

Q Well, out of the eighty, how many produced five million dollars or less?

A I don't know. Maybe 35. Not very many.

Q And how many of those agencies that produced less than five million dollars had another agency in the same town?

A Some did.

Q How many?

A Let's see. We did forty million; fifty million; there were two agencies in Los Angeles, both of whom exceeded this.

Q Los Angeles. Any other cities where there are two agencies?

A In Miami. Both did well in the South Florida area. Minneapolis, we have two agencies; both did well.

Q All right, now,—

A I should point out, Counselor, for the Court, that we are not talking about Pittsburgh. The territory

assigned to this agency is Western Pennsylvania, except for those counties surrounding Erie.

Q Prior to August of 1977, going way back through, what you say were years of terrible production here, in any of those prior years, did you impose a quota that had to be met by Malley-Duff?

A No, sir. We tried every other method of getting ways of helping them get business.

Q You say that you have assigned various employees of the Home Office to various offices in the United States. Did you ever assign any of your Home Office staff to Pittsburgh?

A There have been people come down to help them in the office in Pittsburgh, yes.

Q I am talking about these sales persons that you assigned to Chicago or Cleveland.

A Well, Counselor, I think I might make it clear.

Q Did you or didn't you? Then you may explain.

A We would not have them here as trainees. We would not have them trained by these people.

Q You started at some time, after December 10th, to make a decision on whether to terminate the agency; is that right?

A I think I said January 10th.

Q Well, you told us that you had daily figures. Did you gain some knowledge from those daily figures by December 10th, when the year ended, fiscal year, as to whether you were going to terminate these people?

A Counselor, I testified that, when Mr. Malley and Duff visited me in December, I told them that I hadn't made the decision yet, and I wouldn't make the decision until I got the figures in January, on January 10th.

Q Well, you knew, sir, did you not, that they had not met the quota by early December?

A No, I did not know that.

Q You never took these daily figures and added them together, I guess?

A On December 10th, we could have had a two million dollar case come in, which is not unusual, which would have saved the agency. Crown Life writes, I think last year, wrote well over 110 policies, all in excess of a million dollars. That would have helped them, a great help. As I told you, they indicated to me that there was ten million dollars in business, even in this January meeting, they had ten million dollars in business, they told the President, was just ready to fall in thirty days. That could have fallen very easily in December.

Q How did you select the number for this quota that you imposed in August of 1977?

A I have a formula for doing this, rather complicated.

Q What is the formula?

A Well, I take the market; the availability of the market, the types of brokers, the length of service of the agency, how long the agency has been there, the personnel available to them, the market situation, as far as economics are concerned, and put them together

and arrive at what I think is a reasonable amount of business.

Q Did you bring the worksheets with you for that formula?

A No. I threw them away once I had done it. I do it all the time. I can show you how to do it.

Q You don't hold it in your files anywhere?

A No.

(Plaintiff's Preliminary Injunction Exhibit No. 5 was marked for identification.)

BY MR. TURNER (continuing)

Q I show you what has been marked for this hearing as Exhibit 5 and ask you to identify that, please.

A That was a letter that was sent by Mr. O'Sullivan, indicating that, "The Company hereby gives you notice of the termination provision of" thirty days.

Q Who is Mr. O'Sullivan?

A He is Assistant Superintendent of Agency Administration.

Q Did he send that out upon your instructions?

A Well, you understand, I think, it was made clear to you that I do not have the authority to terminate an agency. That authority rests with the President.

Q And did the President instruct Mr. O'Sullivan to send out this letter?

A I believe that it was sent by Mr. Hutchison, who is my senior, and the Executive Officer in Charge of Marketing.

Q So you had nothing to do with the sending of this letter, I take it?

A Other than saying that I recommended that it be sent.

Q Were you the person who brought the matter to the attention of the President, that it should be sent?

A Oh, yes.

Q That is within your—

A I'm sorry. I brought it to the attention of Mr. Hutchison, who brought it to the attention of the President.

Q I see. But you were the one who reviewed the numbers?

A That is correct.

Q And saw that the quota had not been met?

A That is correct, yes.

Q When did you get these numbers that you could determine the quota hadn't been met?

A On January 10th.

Q I see. And the next day, you had talked to Mr. Hutchison, and Hutchison had talked to the President?

A This is not that quickly done. The whole matter had been given careful consideration by everybody over a period of, not months, but years. We had to do something and the imposing of the quotas had been discussed.

Q No, I am not asking about that, sir. I am asking you now about the decision to send this letter of termination.

A This letter was determined to be sent when they didn't make the quota which everyone knew on January 10th.

Q Thank you, sir. Now, did you receive a copy of this letter at the time it was sent?

A I don't know whether I did or not. Certainly, it wasn't marked, but I knew it had gone out. It's not usual for me to get them. They go into the file.

Q If they had met the quota, would they have been terminated?

A No, sir, they would not.

Q If they had met the quota for 1978,—

A Would they have been terminated?

Q Assuming they had met the one for '77.

A They would not.

Q How did you tell the quotas for '78, '79, '80, and '81 that were in this letter?

A Because that is the normal growth. If you can get an agency moving uphill, these are really minimal objectives for an agency to develop. There is a pattern of growth that is fairly well demonstrated and it is a matter of income to the general agents. The more they grow, the more money they make from the first dollar. In other words, it is a percentage increase, so that the general agent has an incentive to sell more insurance each year, he makes more.

Q Now, when did you first discuss with Mr. Craig the Agency Holding Company's interest in this market?

A I never discussed with Mr. Craig the Agency Holding's interest in this market.

Q Have you done so up to and including today?

A No. The Agency Holding Company, as far as I know—Which agency holding, the one in Chicago?

Q Mr. Lloyd, I show you this paper that the reporter has marked Crown Life Exhibit A.

A Right, sir.

Q You removed this from you pocket.

A Yes, Sir.

Q When Mr. Turner was questioning you.

A Yes.

Q Can you tell me what it is and who prepared it.

A This was prepared by Mr. Hutchison, who is my senior officer, to whom I report. He had it prepared from Company records, showing the net paid history of the Pittsburgh East End Agency, going back to 1962, and what took place when Mr. Duff joined him in 1967.

Q These are the net paid figures?

A It is a measurement of seeing what the production of that agency was, on a year-by-year basis.

Q Now, referring to Plaintif's Exhibit 1, this letter of yours, of August 19th.

A Yes, sir.

Q With the figures in Crown's Exhibit A.

A Yes, sir.

Q Arrived at on the same basis as the figures referred to in the antepenultimate paragraph of Exhibit 1.

A Yes.

Q There may have been some group credits in here, but they would be infinitesimal. So it's fair to compare these figures in Exhibit A with this figure in te antepenultimate paragraph in Exhibit 1?

A Yes, it is, sir.

MR. BLACK: If the Court please, I offer in evidence Crown's Exhibit A.

THE COURT: These are figures,—

MR. LLOYD: This is the history of the Agency, Your Honor.

THE COURT: Mr. Turner can look at that.

MR. LLOYD: I'm sorry, I thought he had.

MR. BLACK: He did, while he was questioning.

THE COURT: I believe, certainly, it is relevant, it was brought up on direct examination.

MR. TURNER: I just don't, can't stipulate to the authenticity of this.

THE COURT: I assume that this witness had.

MR. LLOYD: Yes.

THE TURNER: He said that it was prepared by another man, Mr. Hutchison, I believe.

MR. LLOYD: Yes, but it's prepared from Company figures. That is directly from the Company history.

BY THE COURT:

Q And to your knowledge, Mr. Witness, are those figures accurate and do they reflect the history of the agency in question?

A Yes, they do, sir.

THE COURT: It's admitted.

BY MR. BLACK (continuing):

Q Now, Mr. Lloyd, was there ever a year, as shown by Exhibit A, when Mally-Duff met the—what did you call it, a standard?

A Standard.

Q —standard that you told them you were going to hold them to in 1977?

A Yes, sir. Well, in their own agency, they met the standard in 1970 or just met it by $150,000 in '71. They went over the standard in 1972, and they were over the standard in 1975.

Q So what you told them they would have to do in 1977 was no more than, not even as much as they, in fact, had done just two years earlier; is that correct?

A Yes, sir; that is correct.

Q There is attached to the complaint in this case, Mr. Lloyd, a copy of a memorandum of agreement that is denominated Exhibit A, between Malley-Duff & Associates, Inc., and Crown Life Insurance Company. Is

that the agreement that is referred to as the one that took effect September 1, 1977?

A Yes, it is.

Q What was the reason for having a new agreement at that time?

A Well, we from time to time bring out new products, and we increased commissions and increase bonuses and things like that. We had just done that, and this was bringing all our products under one contract.

Q Well, there were prior contracts, then?

A Yes, sir.

Q Did the earlier ones have Paragraph 30?

A Yes, sir.

Q On termination?

A Yes, sir.

Q On one month's notice?

A Yes, sir. The Company has historically had that.

Q And would it have had Paragraph 27th in it on the ownership of the records?

A Yes, it would.

Q And also Paragraph 1-E, the obligation to maintain records that were to belong to the Company?

A Right.

Q All of those would have been in the earlier contracts?

A Yes, sir.

Q Of the Malley-Duff agency?

A Yes, sir.

MR. BLACK: That is all.

THE COURT: Thank you. I am presuming, then, there are no further questions.

MR. LESHER: I have no questions.

MR. TURNER: I have one question on Exhibit A, Your Honor.

THE COURT: Well, then, I think the next person in the course of our sequence would be Mr. Lesher.

MR. LESHER: I have no questions.

THE COURT: And Mr. Sachs?

MR. SACHS: No.

THE COURT: Now you can proceed.

REDIRECT EXAMINATION

BY MR. TURNER:

Q I notice that you have included on Exhibit A, or whoever prepared it did, a heading called, "West Virginia."

A Yes, sir.

Q Now, isn't it a fact that Malley-Duff also started an agency for you in Erie?

A Yes, sir.

Q Where are those figures shown?

A They are not shown on this sheet; but I can certainly—Erie is producing much more business than Pittsburgh. They are around seven or eight million.

Q Well, my question is, sir, that in some years you show Malley-Duff total, Malley-Duff including West Virginia figures, is that right?

A Yes, sir.

Q And some years, they have total sales including Erie figures.

A Yes, sir, they would have.

Q Why weren't the Erie figures put in?

A I don't know. I didn't prepare the sheet.

THE COURT: Then, if that is the case, this does not fairly and accurately represent the figures, and the Court will strike it from the evidence.

MR. TURNER: Wait, I object to this. I think that the figures, including the Erie figures are in one of the Exhibits, one of the pieces of paper. May I ask counsel if he has them.

BY THE COURT:

Q You have testified that that piece of paper does not include Erie, but that piece of paper does not accurately depict the history of the agency in question, inasmuch as it omits the Erie—

A Agency.

Q —agency, and, therefore, the Court will strike that from evidence.

MR. TURNER: Thank you, Your Honor. I have no more questions.

MR. BLACK: Your Honor, may I ask a question about Exhibit A?

THE COURT: You may.

RECROSS-EXAMINATION

BY MR. BLACK:

Q Is it true that the Erie Agency is a separate agency?

A Yes, sir. As is West Virginia. And in my testimony, we only referred to the Pittsburgh Agency.

BY THE COURT:

Q These figures in Exhibit A are the figures for Malley-Duff & Associates?

A In Pittsburgh.

MR. BLACK: In Pittsburgh.

A And this piece of paper also includes West Virginia.

BY MR. BLACK:

Q But they are shown separately?

A That's right. And we did not include them in our testimony.

Q And what the Erie Agency does is a matter of an entirely different agency?

A Right.

Q The one up in Erie?

A Right.

Q And there wasn't any reason to show it in a list of Malley-Duff agencies?

A No, sir.

Q Was there?

A No, sir.

MR. BLACK: Your Honor please, I think this—

THE COURT: Then the Court is confused. A party to this case is the Malley-Duff Agency?

MR. BLACK: Right.

THE COURT: This Malley-Duff agency extends to Erie, does it not?

MR. LLOYD: No, sir.

THE COURT: It does not?

MR. LLOYD: No, sir.

MR. BLACK: It does not include Erie and the counties surrounding Erie. But it does include the rest of Western Pennsylvania.

THE COURT: Do these figures constitute the history of the agency in question here?

MR. LLOYD: The column headed—

MR. BLACK: Please answer the Court's question.

MR. LLOYD: Yes, sir.

THE COURT: They do?

MR. LLOYD: Yes, sir.

THE COURT: Is the agency in Erie a separate agency?

MR. LLOYD: Yes, sir.

THE COURT: And is it affected by this termination notice?

MR. LLOYD: No, sir.

THE COURT: Well, the Court is confused.

MR. TURNER: Your Honor, may I try a couple questions.

REDIRECT EXAMINATION

BY MR. TURNER:

Q At one time, not today, but at one time, did Malley-Duff have a branch office in Erie?

A No, sir.

Q Did they have a branch agency up there?

A No, sir?

Q Did they have a branch in West Virginia?

A No, sir?

Q Well, then, why did you include West Virginia on that Exhibit A?

A Because Malley and Duff and Dupee owned another agency, together, in West Virginia. Malley and Duff and Oglevee jointly owned an agency in Erie.

BY THE COURT:

Q Then we are talking about something that doesn't involve this lawsuit?

A That's right.

THE COURT: I was lead astray.

MR. BLACK: These figures that this witness testified to are the Pittsburgh Figures. The fact that they also show some figures from West Virginia doesn't make the Exhibit inadmissible.

THE COURT: But the Court sees now that the Court was lead astray by counsel, and the Court does not appreciate that. The Court will receive it into evidence. Let's go on with the case, please. We are running short of time, please, proceed.

BY MR. TURNER (continuing):

Q There is a column on here, called Total, Malley-Duff. Did you see that?

A Yes, sir?

Q Does that column on Exhibit A, Total Malley-Duff, include the West Virginia sales in the years that Malley-Duff had West Virginia?

A Yes, sir, but—

Q Is the Erie situation any different than the West Virginia situation in the years in which Malley-Duff were involved in—

MR. BLACK: I think the witness, he started to say , "but," and you interrupted him. I think he ought to be allowed to finish his answer.

THE COURT: I think that we have exhausted this point. The Malley-Duff agency in this case does not involve Erie. Now, how can we beat a dead horse any more? Is this correct?

MR. BLACK: I agree.

MR LLOYD: That is correct.

THE COURT: Need we go through that anymore?

MR LLOYD: No, sir. It does not include Erie.

THE COURT: It does not include Erie?

MR. LLOYD: Nor West Virginia, no, sir.

THE COURT: Let us move on.

MR. TURNER: No more questions.

THE COURT: Thank you.

MR TURNER: Mr. Duff, please.

THE COURT: Counselor, be succinct in your questions, please. And that matter with respect to Erie, I believe, was irresponsible on your part. There is no room in this judicial proceeding for being misleading to the Court. And I will ask you to be succinct and probative in your questions.

MR TURNER: Your Honor, I apologise, if the Court so considers it. I think there was some confusion. I don't think it's straightened out yet, and I beg the Court's apology if there was some—

THE COURT: There was.

MR TURNER: It was not advertent on my part.

THE COURT: I accept that apology. Let us move on.

MR. JAMES A. DUFF, JR., called as a witness in his own before, first duly having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TURNER:

Q What is your name, please.

A James A. Duff, Jr.

Q What is your address, Mr. Duff?

A 6101 Penn Mall, Pittsburgh.

Q What is your occupation?

A I am a Vice President of Malley-Duff & Associates.

Q How long have you been so employed?

A Approximately ten and a half years.

Q And who are the owners of Malley-Duff & Associates?

A Mr. Malley and myself.

Q And how long has Mr. Malley been associated with the sale of Crown Life Insurance in Pittsburgh?

A Since 1954.

Q Now, you have an office right in the City of Pittsburgh, is that right?

A Yes, sir.

Q At one time, did you have offices in other cities, sir?

A Yes, sir. We did.

Q Where were they?

A We had an office in Erie, Pennsylvania, and an office out of State, in Charleston, West Virginia.

Q Would you look at Exhibit A, please, that has been received here, and state whether or not that is a fair and complete summary of the business done by Malley-Duff & Associates over the years?

A Yes, sir. We were responsible for the totals shown in the last column, which shows total Malley-Duff, including the other agencies.

Q Do those figures include Erie sales?

A I don't see them on the sheets.

Q But they do include sales of your West Virginia operations?

A That is correct.

THE COURT: Have the witness explain the relationship between the Erie office and the one in question. First of all, I would like to know once and for all whether the Erie office includes the Agency which is before this Court.

BY MR. TURNER:

Q Can you answer His Honor?

A Yes. Your Honor, in 1970, we acquired the—we created and built and financed an agency in Charleston, West Virginia. In 1972 we acquired and built an agency in Erie, Pennsyvania. And from 1972, we then operated three separately distinct entities.

BY THE COURT:

Q The entity—I hate to interrupt at this point—but the entity before this Court is separate and distinct from the Erie agency entity?

A That is true.

THE COURT: Let us move on.

BY MR. TURNER:

Q And it is separate and distinct from the West Virginia Agency?

A That's correct.

Q And Exhibit A includes West Virginia: is that correct?

A That is correct.

Q Did you have any quota under which you operated as an agency prior to the mid-year of 1977?

A No, sir.

Q Under what circumstances did you learn of any quota that had been imposed upon you?

A Mr. Lloyd and Mr. Craig visited Mr. Malley and I in Pitssburgh approximately a week and a half before August 19th. And in a joint meeting in Mr. Lloyd's room, we were told that we were going to placed on a quota. It was not a standard performance at that point, as I recall; it was a quota. We asked the amount and there was no discussion as to amounts. Mr. Malley asked if Mr. Lloyd would commit that in a letter. He said he would. The letter arrived August 19th, which sets forth the amount of the quota for the years 1977 through '80.

Q Was the receipt of the letter the first that you had gotten any figures that you had to meet?

A Yes, sir. Yes, sir, that's correct.

Q And what were your understandings as to the time in which you had to meet that quota?

A I had from August 19th, 1977, until December 10th, 1977, to produce approximately 150 percent of our 1976 business.

Q Were you aware of any prior instances where Crown had terminated agencies such as yours, general agents, without any cause?

A No, sir.

Q Did you have any understanding as to whether Crown generally imposed quotas upon their general agents?

A No, sir, not generally.

Q At the time the quota was imposed, were you able to form any impression as to whether you could meet that quota?

A At the time the quota was imposed?

Q Yes, sir. Did you think you could meet it or not?

A No, we did not. We had approximately three months and three weeks to fulfil the quota. We did not think we could make it, barring an exceptional circumstance, which was unpredictable at that point.

Q What do you mean by an exceptional circumstances?

A It could be, with the market, the manner in which we did business, could have brought an inquiry or a case which we might not have been aware of at any time. That is always a possibility but nothing that could be planned upon.

Q All right, now, do you know the total amount of insurance that you have sold over the years that is now in force with Crown?

A We have sold through Malley-Duff and its predecessor companies, I would estimate, about 88 million dollars of ordinary life.

Q And have you been participating in the sale of group policies, as well?

A Yes, sir. We have and I would estimate,—I don't have those figures—I would estimate about 100 million dollars of group insurance.

Q Now, what have you done, you and Mr. Malley, your co-worker, here, done over the years, to promote the business of Crown Life Insurance Company in this territory?

A We have established a rapport with general insurance people, generally, and then agents of other life companies, through advertising, and developing personal rapport with these people, through the expenditure of substantial sums of money to do whatever we thought necessary to make sure we were Crown. If I might cite an example, there is a Pittsburgh insurance directory, and we have on every cover of that directory, it's Crown Life, very large, and this lies, hopefully, on the desk of every general insurance man in the which I assume your client has the original in his possession.

(Plaintiff's Preliminary Injunction Exhibit No. 6 was marked for indentification.)

BY MR. TURNER (continuing):

Q I show you what has been marked as Exhibit 6 and identified as the contract. When you signed this, were there any negotiations on the terms or what the terms would be?

A No, sir. It was not negotiable. If you wanted to represented Crown Life Insurance as a general agent, you signed it.

Q That is a photocopy here. Is the original a printed form or is it on a typewriter?

A This form?

Q Yes.

A This is typed. Did I understand the question?

Q Is it printed or is it individually typewritten, I am saying?

A This is a printed form. It's a fill-in, type of form.

MR. TURNER: I have no more questions, Your Honor.

MR. BLACK: I have one question, Your Honor.

CROSS-EXAMINATION

BY MR. BLACK

Q Mr. Duff, this meeting that Mr. Lloyd that you testified to, that preceded the receipt of this August 19th, letter, that wasn't the first time Mr. Lloyd had indicated to you that he thought your agency ought to be performing better than it was, was it?

A Sir, the discussion at that time was not about our agency performance; he just made the statement to get him out of there, or the contract would be terminated.

Q Well, I must insist that you answer my question.

A I'm sorry.

Q Let's put it this way. The letter of August 15th, was it that you received, setting up standards, for performance that wasn't the first indication you had from Mr. Lloyd that he wanted your agency to be performing better than it had been was it?

A No, sir, to answer your question.

MR. BLACK: That is all.

BY MR. LESHER:

Q Mr. Ehrman have any discussions with you about the termination of this contract prior to receiving the letter of termination?

A No, sir, he did not.

Q To your knowledge, did he have any involvement in this matter?

A Any involvement in the termination?

Q Yes.

CROWN

LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

August 19th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

This letter will confirm our conversation regarding the Company's attempts to increase our share of the Pittsburgh market.

As you know, the Agency was incorporated in 1954 and is one of the older agencies within the Company. It started as Young, Malley & Kekich and shortly after the original agency was formed the three partners decided to break up and Mr. Young left the business, Mr. Kekich organized his own agency and Mr. Malley organized his own agency. The Kekich Agency and the Malley Agency operated as personal producing agents for some time with unspectacular results.

In 1967 and 1968 we suggested that Mr. Malley find a partner who would help develop the business on a more productive basis and in 1968 he was jointed by Mr. Duff. From 1969, 1970, 1971 and 1972 the Agency started to develop at a reasonable pace; in 1968 winning the Crown Life Cup and in 1974 winning the Director of Agencies Trophy. However, from 1972 to the current period the

flow of Ordinary business has been erratic and the current position of the Agency at June, 1977 both in Ordinary and Group is extremely disappointing and the prognosis for the Agency is not encouraging, particularly on the Individual side.

The number of active producing brokers is reducing and not encouraging as far as future development is concerned. It is the oldest agency in the State of Pennsylvania as far as continuing management is concerned, but its growth has not been consistent and is certainly less now than it was in the late sixties. More importantly, in comparing the effective job that Pittsburgh East End is doing in its market, and comparing it to new agencies in Pennsylvania, it is not maintaining a preeminent position as it should both due to the age and maturity of the agency and the market that it is serving.

For example, the Erie Agency in a very small community has a much more substantial paid for business for the first six months of June, 1977, as does Philadelphia, as does Pittsburgh Center, a personal producing agency in Pittsburgh. Harrisburg, a new agency, has more than half a million paid for as does Allentown another new agency in Pennsylvania.

Obviously, Allentown, Harrisburg and Erie do not have the extra support of a Group Office in their immediate territory and there is a good deal of evidence to indicate that a Group office has a synergistic effect on the production of an agency, bringing it up to the top level.

All of the foregoing is to indicate that the Agency is not fulfilling its marketing function and as a result we have decided to take three direct steps to increase our position in the market.

We will actively seek a new general agency for Pittsburgh or, alternatively, study the market penetration potential of the Jules Ehrman Agency.

We will agree to maintain the Malley Duff Agency if the following standards are met: An Ordinary Net Paid level (including Individual Health) at December, 1977 of $7,500,000; an Ordinary and Individual Health Net Paid Score in December, 1978 of $10,000,000; an Ordinary and Individual Health Net Paid Score at the end of December, 1979 of $15,000,000 and an Ordinary and Individual Health combined Net Paid level at the end of 1980 of $20,000,000. And that this level is maintained and that the Agency because of age and market remains in the top 25% of the company's agencies serving the United States.

The above levels of performance should be maintained under the current market conditions. If the market conditions substantially change so as to effect the agency's operations over which the agency and agency personnel have no control, adjustments to these standards would be made.

I am setting these conditions forth to give you our views at this time and to clearly understand the objectives that we all have in mind.

Kind personal regards.

Sincerely,
C. B. LLOYD

C.B. Lloyd:yj

Senior Agency Vice-President
for the United States

CROWN

LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

October 4th, 1977

Messrs. Tom Malley & Jim Duff,
Malley-Duff & Associates, Inc.
Managing General Agents,
Crown Life Insurance Company,
Pittsburgh, Pennsylvania

Dear Tom and Jim:

In reviewing the 15th September Production Summary I note that in September, 1976 the Net Settled Issues Ordinary totalled $2,692,059 and the Net Paid for the same period was $2,892,799. At September, 1977 the Net Settled Issues were $3,049,929 and the Net Paid Ordinary for the same period $3,204,500. The total Net Paid including Individual Disability and Group at the 15th September, 1976 was $3,685,651 and the Net Paid in September, 1976 was $3,886,505. The Net Settled Issues for the same period by September 15th, 1977 had reduced to $3,273,509 and the Net Paid by September, 1977 was $3,554,250.

The potential net Paid for the current year is $147,000 and it is at this point very difficult to see how the agency can reach the reasonable quotas that we discussed previously. I strongly urge you to put forth every effort to avoid the

termination of your contract for lack of production at the beginning of 1978.

Kind personal regards.

Sincerely,
C. B. LLOYD

C.B. Lloyd:yj

Senior Agency Vice-President
for the United States

c.c. Mr. M. B. Hutchison

CROWN

LIFE INSURANCE COMPANY • 120 BLOOR STREET EAST
• TORONTO • CANADA • M4W 1B8

REGISTERED

January 11th, 1978

air mail

Malley-Duff & Associates Inc.
Crown Life Insurance Company,
Liberty Building,
6101 Penn Mall
Pittsburgh, Pennsylvania 15206

Attention: Mr. James A. Duff Jr.
Mr. Thomas E. Malley

Dear Sirs:

The Company hereby gives notice of termination pursuant to Provision 30 of your General Agency Agreement which took effect September 1st, 1977.

Termination becomes effective one month from the date of mailing of this letter.

Your truly,
D. B. SULLIVAN

D. O'Sullivan,
Assistant Sup[illegible]ndent,
Agency Administration.

DO:lc

Malley-Duff Net Paid History

		Pittsburgh East End		West Virginia	Total Malley-Duff
1962	Malley	64,478			64,478
63		986,754			986,754
64		1,115,385			1,115,385
65	Malley & Assoc.	914,431			914,431
66		1,096,175			1,096,175
67	Malley-Duff	1,800,000			1,800,000
68		3,479,298			3,479,298
69		4,959,657		1,068,500	6,028,157
70		6,908,512		4,883,750	11,792,262
71		7,325,867		1,071,760	8,397,627
72		7,983,144		3,844,848	11,827,992
73		5,473,671		2,407,117	7,880,788
74		6,726,303		2,849,171	9,575,474
75		8,288,944	sold to	(2,468,111)	8,288,944
76		5,176,478	Dupay	(7,347,069)	5,176,478
77		5,518,155		(2,364,337)	5,518,155

CERTIFICATE OF SERVICE

certifies that a true and correct copy of has been served by hand-delivery this 29th following counsel:

Alexander Black, Esquire
Buchanan, Ingersoll, Rodewald
Kyle & Buerger
Floor, U.S. Steel Bldg.
Pittsburgh, PA 15219

Woodruff Turner, Esquire
Kirkpatrick, Lockhart,
Johnson & Hutchison
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Pittsburgh, PA 15222

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